CHAPTER 18

PROFESSIONALISM: BE THE PERSON YOUR DOG THINKS YOU ARE

The Honorable John V. Acosta
United States Magistrate Judge
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Multnomah County Circuit Court Judge

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Oregon State Bar

Statement of Professionalism

Adopted by the Oregon State Bar House of Delegates and
Approved by the Supreme Court of Oregon effective September 16, 2019

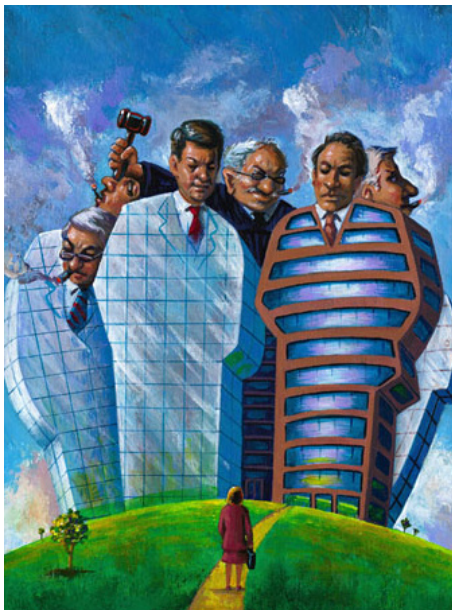
As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is consistent conduct that includes compliance with all ethical rules promulgated by the Oregon Supreme Court, courageous representation of clients, striving for the public good and complying with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts and all others:

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client's goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.

Professionalism for Litigation and Courtroom Practice

Conduct Counts

By Hon. Daniel L. Harris and John V. Acosta



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Ensuring the quality of our professional lives and improving the public's perception of our profession begins with our conduct toward each other. It also rests on our conduct in the courtroom, before judges, opposing counsel, juries and members of the public. Lawyers are educated and trained to exercise a high degree of skill and competence in representing individuals and organizations in the legal system. They should complement those attributes by exercising the highest standard of conduct when dealing with judges, clients and one another, whether verbally or in writing.

Professionalism differs from ethics in that ethics rules are mandated rules of conduct, while professionalism is a standard to which lawyers should aspire. The following suggestions for observing professionalism stem from years of litigation and courtroom experience — and some hard lessons learned during that time. This list was compiled from comments received from judges, attorneys and clients who were asked for suggestions on what can be done to improve professionalism. Integrating these suggestions into daily practice not only will improve the quality of your professional life, but will also make you a more effective advocate for your client.

1. Promote the efficient resolution of disputes.

In most cases, an attorney should advise the client of the availability of mediation, arbitration and other appropriate methods for resolving disputes outside of the courtroom. A professional lawyer should always consider, and advise the client of, the most efficient way of resolving the dispute. This includes consideration of the effect litigation and particularly the trial will have on your client and the benefits to your client that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost; staying out of court usually accomplishes that goal. Attorneys should do everything they can to resolve pretrial disputes without involving the court. This is especially true with disputes over discovery issues — many motions to compel discovery can be resolved without using the resources of the justice system.

2. Be a counselor to your client, not a mere puppet.

Clients don't always know what is and isn't right. They aren't familiar with the ethics rules that bind lawyers and the unwritten local conventions lawyers observe when working on cases with one another. Some clients want you to dislike the opposing party as much as they do and, thus, they expect you to make the other side's life miserable. Some clients also might not appreciate that you and your opponent are professional colleagues and very likely will have cases against one another in the years to come, and they might not take into account that your relationship with a judge is important to your ability to represent them in the current case and other clients in future cases.

Adopting a "scorched-earth" or "take-no-prisoners" approach to litigation will not serve your client's interests and ultimately will work to your client's disadvantage in resolving the dispute. A lawyer should defuse emotions that might interfere with the effective handling of litigation and which could complicate or preclude resolution of a dispute in a way that best serves the client's interests. If a client requests or insists upon a course of action that is contrary to local custom or would be counterproductive to the client's interests, tell the client so and explain why. Some clients might take longer to understand this notion than will others, but you can't represent your client's interests by taking an action you know will ultimately harm those interests.

3. Keep your word.

Lawyers spend a lot of time putting things in writing, but in the daily practice of litigation a lot of routine business gets done verbally. Your ability to practice effectively will depend to a large degree on whether opposing counsel and co-counsel trust you. If your colleagues know they can trust you to do what you say, your professional life will be a lot easier. So, do what you say you will, and if you can't do or agree to something, then say you can't do or agree to it. You'll find that a little candor goes a long way.

4. Don't fudge.

Credibility is everything. Some lawyers gain a reputation for being fudg-

ers. They overstate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. Some attorneys believe they are simply zealously representing their clients when they stretch or shade the truth. They are actually doing a disservice to their clients. Once this reputation sets in, it is difficult for a lawyer to regain credibility, and it ultimately diminishes the lawyer's ability to be effective as an advocate. Credibility and reputation are earned from hard work, ethical practice and a believable and accurate representation. Credibility and reputation will get you a lot further during litigation and especially in a courtroom than any other aspect of your practice.

5. Disagree agreeably.

Lawyers don't always agree, especially when they are on opposite sides of a case. But a disagreement between lawyers shouldn't devolve into a declaration of war. Lawyers should keep in mind that disagreements are inherent in litigation and that each side has a job to do for his or her client. In doing that job it is inevitable that lawyers will disagree on the facts, legal or procedural issues, the credibility of a party or witness, or the value of a case. When the disagreement can't be resolved, accept that the disagreement is a legitimate difference of opinion between two professionals and don't take it as a personal affront.

6. Extend professional courtesies.

"Live by the sword, die by the sword." It's a maxim that applies to litigation and to litigators. The professional lawyer consents to reasonable requests for extensions of time, resets, rescheduling and other routine matters. If such a request won't prejudice your client, there's usually no legitimate reason not to agree to an opponent's request. If you refuse a reasonable request and your opponent takes the matter to the judge and you can't demonstrate prejudice to your client or unreasonableness by your opponent, think about how you'll look to the judge. The time will come when you'll need an extension, reset or rescheduling of a deadline or event. When that time comes, don't expect your opponent to be reasonable toward you if you've refused similar requests from your opponent.

7. Be prepared.

The process of litigating a case and preparing it for trial can be more important than the trial itself. Being prepared is to know the rules of civil procedure and courtroom protocol and to follow those rules. This includes such things as: conducting efficient and focused depositions; knowing cases cited in the briefs to address questions at oral argument; marking your exhibits and preparing an exhibit list before trial; exchanging your exhibits with the opposing counsel before trial; knowing what is and is not appropriate to mention in your opening statement; knowing how to offer an exhibit into evidence; carefully selecting and preparing jury instructions and understanding the hearsay rule. Professionalism begins with conducting all phases of litigation well and being prepared to enter the courtroom to conduct your business there in a competent manner.

8. Be on time!

Some lawyers have a hard time showing up at a deposition, a hearing or even the trial at the time it is scheduled to be conducted. Most lawyers work at showing up on time and if they can't be there on time, they make an effort to notify their opponent or the court of the reason for their tardiness. But some lawyers have no problem with regularly being 10 or more minutes late for a scheduled appearance and never understand that showing up late for a scheduled proceeding or court appearance exhibits an attitude of disrespect for those who are being made to wait.

9. Be courteous and respectful.

A little courtesy and respect go a long way. You can't belittle or mistreat courthouse staff or opposing counsel without affecting your standing with the judge or the trier of fact. Whether dealing with opposing counsel, a court reporter, courtroom staff or your own co-workers, showing respect toward everyone is often the most effective way to establish the basis for relationships that will serve you and your client well later on. Treating an opponent with respect and professional courtesy typically creates a cordial (if not friendly) dynamic that gives you credibility and influence with your opponent. Ultimately, these characteristics will translate into

better results for your client, regardless of whether the case settles or goes to trial.

10. Pay attention to your appearance.

Most lawyers are appropriately dressed and groomed when they participate in a case proceeding and come into the courtroom. Some forget where they are. Professional lawyers present themselves in such a way as to not detract from the presentation of their case.

11. Maintain an appropriate demeanor.

It is unprofessional to overreact in the courtroom to something you don't agree with — especially to a ruling by the judge on an objection. Some lawyers have the unfortunate habit of overreacting to testimony or to a ruling they don't agree with in the courtroom. This tends to undermine a lawyer's effectiveness and credibility in the courtroom. The advice of one judge is to "not take a judge's ruling or decision personally."

12. Object to the evidence in an appropriate manner.

Trial lawyers should be frugal with their objections. If it is not hurting your case, don't object. Seasoned trial lawyers object infrequently; rookies jump up and down constantly. It is unprofessional and ineffective to be registering constant objections. When an attorney makes an objection to the evidence, the attorney should stand and say "objection," and in a summary fashion state the basis for the objection, such as "relevance" or "hearsay." If the court wants the other attorney to respond, the court should so indicate. Lawyers can become sloppy and unprofessional with the objection process. Most judges do not appreciate "speaking objections," where the attorney ends up giving information to the jury that can't be obtained from a witness.

13. Write as if your reputation depended on it.

During a typical case your written communications will comprise the majority of your contact with the judge, your opponent and your client. In many cases, your written word is often the first contact you will have with each of them.

Don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks.

Each time you compose a pleading, brief, letter or e-mail, you shape your professional reputation. With that in mind, don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks. Don't overstate the facts of the case, and be careful to accurately present relevant legal authority. Proofread your written work for grammar, spelling and typographical errors. Remember that each time you write you have the unique opportunity to build your professional reputation among judges, colleagues and clients, so make sure you're creating a reputation you can live with.

14. Avoid ex parte contacts with the court.

Any attempt to gain an advantage over your opponent through an ex parte contact with the court, or the court staff, will poison your reputation with a judge. This includes everything from direct contact with a judge on the merits of the case to supplying information to the court without adequate notice to opposing counsel. For example, it is not appropriate to place a motion or memorandum into the hands of the judge while mailing a copy of the document to opposing counsel, which may arrive at the lawyer's office two or more days later.

15. Don't take unfair advantage of opponents.

While it's part of the litigation process to capitalize on your opponent's mistakes or inexperience, it's not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client — and make you look foolish in the process.

16. Don't do something just because you can.

Justice Potter Stewart once said, "There is a big difference between what you have a right to do and what is right to do." No ethics rule prohibits lawyers from yelling at their opponents or engaging in intimidating behavior, and the ethics rules don't require that lawyers be cordial to one another. On the other hand, think about how you'd like to spend the next 40 years as a practicing lawyer. Do you want to build hostile and acrimonious relationships with lawyers against whom you might be practicing for decades? Probably not. It usually takes very little effort to be cordial to your opponent, and that small investment of goodwill will pay large dividends to you in the years to come.

17. Don't behave differently than you would in front of a judge.

The great bulk of litigation occurs outside the presence of a judge. The rules of professionalism aren't different just because the judge isn't present to watch your every move. If you wouldn't engage in the behavior in front of a judge, then don't do so when the judge isn't around.

18. Don't let your opponent control your behavior.

Some lawyers behave unreasonably or harshly, or are consistently difficult precisely because they want you to lose your objectivity and shift your focus to "getting back" at them. They know that if they can get you to focus on them, then you'll spend less time working up your case. Once they get you thinking about how to get back at them and not about how to build your client's case, they've won. So

keep your balance. Your client deserves an objective, diligent advocate — not a hothead bent on vengeance against another lawyer.

19. Don't take yourself too seriously.

A wise practitioner once said, "Take what you do seriously, but not yourself." Keep in mind that the case is not about you. Many lawyers over-estimate the impact they have in the cases they try in the courtroom. The truth is that the trier of fact focuses on the message (i.e., the facts) and not the messenger unless, through inappropriate conduct, the messenger gives the trier of fact reason to focus on him or her.

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Judges and Lawyers in Partnership

The Practical Rationale for Professionalism

By the Hon. John V. Acosta and Richard J. Vangelisti

The role of lawyers and judges is to help people in our legal system simultaneously exercise their rights and reach the common good under a rule of law. Our mandate of professionalism emphasizes the roles that judges and lawyers alike have in maintaining the integrity of the judicial process, protecting the public and ensuring the future of our profession.

Why Professionalism?

Justice Sandra Day O'Connor explained: "Lawyers possess the keys to justice under a rule of law, the keys that open the courtroom door. Those keys are not held for lawyers' own private purposes; they are held in trust for those who would seek justice, rich and poor alike."[1] Professionalism can be defined as the continuous affirmation in our day-to-day actions that we are striving for the higher ideal of justice for our clients and ultimately for the public good. When we step into the federal courthouse in Portland, lawyers are reminded of their solemn commitment to professionalism: "The First Duty of Society is Justice." It's difficult to convince clients, other lawyers and the court that you are fulfilling that duty if you are behaving as though you are ready to engage in a cage fight.

Professionalism and ethics are not synonymous. Ethics rules mandate minimum behavioral requirements, which if not met, usually result in some form of discipline from the state bar association, the regulatory body that oversees all lawyers. Professional-

ism embodies aspirational goals that lawyers, as practitioners of a distinguished profession, should strive to meet when dealing with each other, the court and clients. Conducting oneself professionally helps ensure public trust and confidence in the integrity of the justice system.

Professionalism also demonstrates the lawyer's integrity and respect for the judicial process, which in turn engenders credibility. In our profession, credibility is the currency of the realm. No lawyer gets much accomplished for a client, whether in the courtroom or in the conference room, unless he or she has built a foundation of credibility upon which to conduct the client's business. This enhanced credibility of the lawyer in the eyes of opposing counsel, the court and the jury inevitably helps a lawyer advocate towards an efficient and fair resolution of a dispute. Acting professionally helps to better focus opposing counsel, the court or the jury on the issues for decision rather than on the conduct of the lawyers, avoiding a scenario that often leads to a written and oral record clouded with personal attacks and other boorish noise.

Professionalism and effective advocacy go hand-in-hand. Professionalism begets trust, and cooperation is sure to follow closely behind. This trust and cooperation translates to lower costs of litigation and a higher probability of an early and fair resolution.

Professionalism among lawyers and the court also makes the practice of law a more fulfilling life. A lawyer's good reputation — the legacy that remains beyond one's life — will be the better for having acted with professionalism.

Finally, professionalism is necessary to maintain the integrity of the judicial process and the public's confidence in the judicial system. Professionalism increases public confidence in individual lawyers and judges as well as the judicial system. The public has a greater respect for the judicial process and the results of that process if the lawyers and judges exhibit professionalism while working through a dispute. If judges and lawyers do not act to ensure professionalism, through legislative action the public may seek changes to the judicial branch or alter the exclusive privilege of lawyers to represent clients before the courts or in legal matters.

Causes of Unprofessional Conduct

Unprofessional conduct is the result of a number of factors. First, unprofessional conduct may result from a belief that a lawyer is effective only if he or she acts like a "Rambo litigator," "hired gun," "junkyard dog," "hard fighter" or "bulldog." Some lawyers who labor under this belief are often compensating for a lack of experience, skill or confidence.

Second, client perceptions — that their lawyer must be obnoxious to achieve successful results or outcomes — are sometimes a factor in unprofessional behavior. Some clients are convinced that litigation should be conducted like armed combat against an enemy, and such clients may shop around until they find a lawyer or firm they perceive to have a "Rambo litigator" style. When we encounter prospective clients who subscribe to this philosophy, we should stop to consider whether we want to represent such clients. Often, they are the clients who criticize your judgment, find ways to dispute your fees and never seem to be happy with any result you obtain for them.

Third, the adversarial nature of the litigation process or a tense business transaction can be a factor. But while the legal process is adversarial it need not be acrimonious. We should strive to agree to disagree and not resort to personal attacks, condescending comments and threats of sanctions motions, whether orally, in briefs or in letters or e-mails, in an effort to get our way or to simply harass our opponent.

Fourth, the adversary system is inherently stressful. Practicing law is difficult enough without artificially ramping up the stress level. Be mindful too that at any given time an opponent might be coping with stress, perhaps significant, because of workload, events in his or her personal life or other factors.

Fifth, the business of practicing law can be a factor — the bottom line of the law firm or law office environment. Billable hours, high case volumes, insufficient support staff, administrative chores, client expectations, marketing and other obligations and duties can result in a "piling on" feeling of despair. The sheer weight of these responsibilities can make it difficult for us to be civil to one another, and that's when professionalism suffers.

Sixth, and finally, are size and technology. As the bar's membership grows, there is less opportunity for its members to know each other. You're less likely to be rude and harsh toward a lawyer you've known for some period of time and will deal with again, than you are toward a lawyer you've never met and likely won't encounter again. Technology hampers collegiality because it allows us to insulate ourselves from direct, real-time contact with one another. Meetings and phone calls to discuss a new case, confer over a motion or discuss trial exhibits and jury instructions are more likely to foster professionalism between lawyers than sending e-mails, texting messages or faxing letters back and forth.

Costs of Unprofessional Conduct

For starters, the costs of unprofessional conduct include a diminished quality of professional and personal life. We aren't hockey players. Do we want to spend eight, 10 or 12 hours a day engaging in the verbal and written equivalent of body-checking each other into the boards each time we interact with one another? We don't, and common sense tells us why: we can't behave badly day after day, for weeks, months and years of practicing law without becoming that personality in all aspects of our lives. Ultimately, the pernicious effect on one's family, friends and colleagues over the course of a 30- or 40-year career should be obvious.

Without professionalism lawyers are simply pieces in a game of survival of the fittest. In such a model, brute force dominates and what is right and just is often relegated to secondary importance or completely overlooked. In effect, lawyers devolve into mere agents of their respective clients' interests without regard to the broader picture of public good.

Unprofessional conduct also distorts the judicial process and "Equal Justice Under Law;" increases financial, business and personal costs to parties; inflicts personal stress on clients, lawyers and judges; causes personal and professional relationships to deteriorate; erodes personal physical and mental health; damages or destroys your reputation among colleagues and the public at large; and diminishes your ability to attract desirable clients.

The Relationship Among the Rules and Professionalism

Oregon's Rules of Professional Conduct (RPC or ethics) and

the various state and federal rules of procedure and evidence are mandatory rules. Professionalism, however, is a standard to which lawyers should aspire. Professionalism picks up where the ethics rules leave off. Professionalism means following the spirit of the rule, not just the letter of it, and the willingness to go beyond what is required to extend courtesies and accommodations to colleagues, including opponents, where doing so imposes no detriment on your client.

The Oregon State Bar's current "Statement of Professionalism," was adopted by the OSB House of Delegates and approved by the Oregon Supreme Court, effective Nov. 16, 2006. A "Statement of Professionalism" also has been adopted by the United States District Court for the District of Oregon. Other standards may apply in Oregon as well, as many professional organizations have adopted Professionalism goals. See, for example, the Multnomah Bar Association's "Commitment to Professionalism," adopted June 1, 2004. These documents may be found on the Oregon State Bar's Professionalism web page, *www.osbar.org/onld/professionalism.html*.

Whether it's a court or an organization that has adopted a statement of professionalism, the fact that it has embraced those ideals demonstrates the expectation that a standard of conduct higher than the floor created by the ethics rules applies. Simply put, a statement of professionalism sends a message that it is not enough for lawyers to comply only with the ethics rules or rules of procedure.

Moreover, as a self-regulating profession, lawyers have the primary responsibility of ensuring professionalism. While a wide range of options are available to a lawyer to effectively deal with the unprofessional conduct of another lawyer, instances exist when a lawyer must at some point present the issue to the court for resolution.

When to Bring Unprofessional Conduct to the Court's Attention

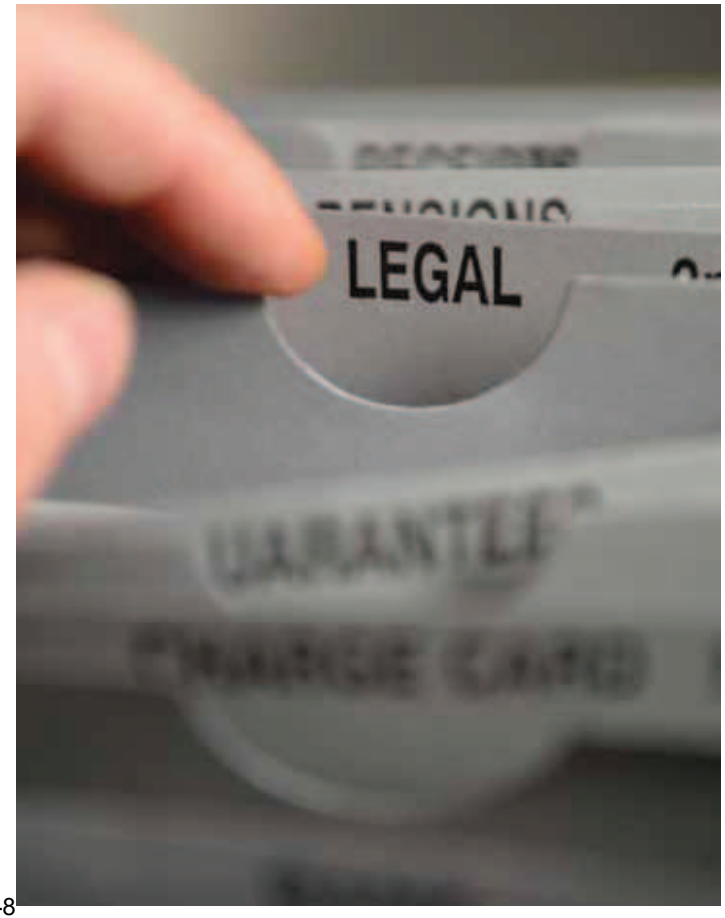
Unprofessional conduct should be brought to the attention of the court only as a last resort when a party's rights are prejudiced or there is a real threat of prejudice. Lawyers — the persons charged with resolving differences — are in the best position to resolve professionalism issues. A lawyer may take a number of steps to obviate the need for court intervention. If those efforts are unsuccessful or futile, then the matter should be presented to the court after the appropriate conferral. Consider these three steps when confronting what you perceive to be a lack of civility.

First, before making a judgment about whether a lawyer has acted unprofessionally, determine the facts. A lawyer's conduct is often caused by circumstances outside his or her control. For example, if a lawyer is not producing responsive documents in a timely manner, the delay may be caused by the actions of the client rather than the lawyer. Similarly, a delay in responding to requests for scheduling or conferral may be caused by another professional commitment or even a personal issue. Effective communication can often reveal whether there is an issue of professionalism. A telephone call or e-mail to the lawyer, co-counsel or an assistant can often clear up the matter. The bottom line is to get your facts straight before operating on the assumption that a lawyer is acting unprofessionally. With a full picture of the facts, you can effectively respond.

Second, when faced with unprofessional conduct, the first strategy may be to ignore it. The conduct may not be worth acknowledging, and at times a decision to not respond to unprofessional conduct will send the signal to the offending lawyer that unprofessional conduct will be ineffective. Some lawyers, often those who are more experienced, use unprofessional conduct as a tool to throw their opponent off balance. The offending lawyer, however, may abandon the costly approach of unprofessionalism if it proves ineffective. Sometimes ignoring unprofessional behavior requires patience, even a lot of it, and it should never be ignored if there is a real threat of prejudice to the client. Mostly, however, demonstrating that the behavior won't work and focusing on the merits of the case often is the best way to put an end to such tactics.

Third, after exercising judgment as to whether to respond to the unprofessional conduct, directly informing your opponent of the unprofessional conduct can be effective. Even those who act unprofessionally do not like to think of themselves as having acted in such a way. They might think of themselves as fighting hard or being zealous for their client. Reminding the other lawyer of basic principles of courteous or fairness or referring to the applicable standards of conduct promulgated by the court, however, can cause the other lawyer to moderate or stop the behavior.

If informal efforts are not successful, an issue of unprofessional conduct should be presented to the court if the conduct is interfering with a party's rights or the "just, speedy and inexpensive



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determination" of an action. FRCP 1; ORCP 1 B. Unprofessional conduct between lawyers that is merely rude, bothersome or petty should not be brought to the attention of the court unless it begins to interfere with discovery or the case's overall progress. A good guideline is that unprofessionalism should be brought to the attention of the court either when an ethics or court rule is clearly implicated or when a history of sufficiently documented unprofessional conduct demonstrates a threat to the rights of a party.

Obviously, considerations of time and cost are at play, but these considerations must be weighed against the potential benefit of a favorable ruling and more generally addressing the unprofessional conduct.

How to Bring Unprofessional Conduct to the Attention of the Court

The nature of the conduct determines how the conduct should be brought to the court's attention. If the unprofessional conduct occurs during trial or hearing, the court usually will address it without the need for a lawyer to call attention to it by objection or request for a side bar. If the conduct occurs outside the presence of the court, a request for a pretrial conference may be appropriate to address the issue. If an issue arises during a deposition, judges often are available by telephone to immediately address the problem. Other instances will require a formal motion.

Before a motion can be filed, however, the lawyer must have a personal or telephone conference with opposing counsel on issues or disputes. Oregon's conferral rules, Local Rule 7.1 (federal) and UTCR 5.010 (state), require a "good faith" effort to confer.

These conferral rules require that the lawyers actually talk or explain in a certificate why conferral did not occur, and these rules are often strictly enforced.[2]

The conferral rules address the situation in which a lawyer may be obstructive or dilatory in the conferral process. If a lawyer refuses to confer, simply include that in the certification. A clear refusal to confer, however, does not happen frequently. The problems most often arise when a lawyer chooses not to provide sufficient information for a meaningful conferral. For example, some lawyers choose not investigate whether there may be responsive documents and simply "stand" on their objections. The failure of a lawyer to determine if requested documents actually exist can lead to the parties briefing and courts ruling on the discoverability of documents that do not exist. This scenario is costly to the parties and the court when it ends up ruling on hypotheticals.

Lack of Experience Can Play a Role

Often times, unprofessional conduct is the product of a lack of experience or a desire to compensate for inexperience. In some instances, inexperienced lawyers neither fully understand that they are expected to be professional, nor understand that a professional approach is the most effective, nor do they understand what is or is not professional. In yet other instances, an inexperienced lawyer may attempt to make up for lack of experience by engaging in short-sighted and obnoxious strategies to gain an advantage, however short-lived. Sometimes, inexperienced lawyers are told or "taught" that being subjected to sharp practices is just a right of passage — part of the hazing process. This "tradition" perpetuates unprofessionalism.

Responsible mentorship of younger lawyers is a key to instilling professionalism. Oregon law schools are answering the call to teach future lawyers that professionalism is expected and effective in law practice. The New Lawyers Division of the Oregon State Bar and various bar associations have mentorship programs. In addition to these formal programs, judges and lawyers at every opportunity should reach out to fellow lawyers — in words and deed — to spread the message of professionalism.

Conclusion

Professionalism is consistent with that shared value to do good that led us to law school. The citizens of Oregon and members of the bench and bar who each hold the privilege to serve the public expect and deserve professionalism in our judicial system. We must constantly renew our sense of commitment to our court system and the public good. The judges and lawyers of Oregon are in partnership to support one another to live the ideal of professionalism.

Whatever a lawyer may gain by unprofessional conduct is frequently short-lived. Unprofessional conduct is subject to the law of karma or that proverbial boomerang that returns to hit its thrower between the eyes. In our Oregon legal community, conduct unbecoming of our profession is noticed by other lawyers and eventually within the circle of judges. A lawyer can labor for years to build a good reputation, but a single act of unprofessionalism can cause that reputation to evaporate.

We should avoid engaging in unprofessional behavior even if the other side is doing so. We also should refrain in argument and written submissions from personal attacks or criticisms of opposing counsel. Model professional behavior when dealing with all others encountered in your daily practice, especially younger lawyers. These acts will reward the lawyer, the client and the public we serve. B

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Endnote

1 Speech, "Professionalism," Associate Justice Sandra Day O'Connor, 78 Oregon Law Review 385, 390 (Summer 1999).

2 See, for example, Section 4(A)(3) of the Multnomah County Civil Motion Panel Statement of Consensus: "[The certificate] must either state that the lawyers actually talked or state facts showing good cause why they did not."

Professionalism: A Judge's Perspective

By the Hon. John V. Acosta

Judges and lawyers are partners in ensuring professionalism. Each has a role to play in preventing and addressing unprofessional conduct that erodes the civility of practice and the quality of our professional lives. If judges and lawyers do not effectively respond to unprofessional conduct, or if they condone it by inaction, they effectively reward the actor to the detriment of the judicial process and the public's perception of our profession as a whole. Oregon lawyers and judges share a long and demonstrated commitment to ensuring that professionalism is always a foremost consideration. With all of this in mind, here is one judge's perspective on fulfilling the judicial role in addressing unprofessional conduct.

Court Authority to Address Issues of Professionalism

Yes. The court always may use its contempt power to address egregious behavior that occurs in its presence, but less severe behavior also can be — and is — the subject of court regulation. Best known are the obligations imposed on lawyers and parties under the civil rules' discovery provisions. Both the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure permit the court to impose sanctions for violations of the rules and for disregarding court orders. But the rules also permit the court to impose sanctions for conduct that undermines the purpose of the discovery rules even if the conduct is not willful. For example, FRCP 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," and subsection (a)(5)(A) of the rule makes clear that sanctions may be awarded without a finding that a party violated a court order or engaged in willful misconduct.

Imposition of sanctions under the rule turns on a reasonableness standard, a lower measure from the intentional misconduct standard that lawyers typically assume controls their discovery-related behavior. This standard has been applied in the District of Oregon. See, e.g., *Trustees of Oregon-Washington Carpenters-Employers Trust Funds v. Van Zant Construction, Inc.*, 2008 WL 2381641, *3 (D. Or. June 3, 2008). Thus, although not willful misconduct, prolonged procrastination in responding to discovery requests that forces the propounding party to file a motion to compel simply to get a response is sanctionable under Rule 37. See *Bilyeu v. City of Portland*, 2008 WL 4912048, *3-7 (D. Or. Nov. 10, 2008).

In addition, FRCP 83(a)(1) expressly authorizes district courts to "make and amend rules governing its practice," a source of authority that the District of Oregon has invoked to establish two rules that govern professional standards of conduct in the district. The first is LR 83-7, "Standards of Professional Conduct," providing that attorneys practicing in the District of Oregon must, among other things, be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this court's Statement of Professionalism.

The second local rule is LR 83-8, "Cooperation Among Counsel," which proscribes certain behaviors between opposing lawyers and establishes the consequences for engaging in unprofessional behavior. Note that the rule authorizes the judge to impose sanctions against an attorney who unreasonably refuses to "accommodate the legitimate requests of opposing counsel." Here, a reasonableness standard is applied to conduct occurring outside the judge's presence.

Finally, professionalism also is embodied in mandatory conferral requirements adopted by both the U.S. District Court and the Oregon Circuit Courts. See LR 7-1(a)(1)(A), requiring the parties to certify that before filing a motion, they "made a good faith effort through personal or telephone conferences to resolve the dispute and have been unable to do so"; and Oregon Circuit Court Uniform Trial Court Rule 5.010, requiring lawyers to certify that they have conferred on motions as a precondition to their filing.

These rules convey the message that judges expect lawyers to talk and attempt to resolve disputes that could lead to motions, and they apply to virtually every motion. Failure to comply with these rules will incur risk of having the motion denied outright. Ultimately, conferral requirements force lawyers to meaningfully discuss a motion and resolve the issues that lead to the filing of motions. When that occurs, parties are spared unnecessary time and expense, the case moves forward more quickly, and the lawyers might establish a foundation for resolving other disagreements without court involvement.

When Should the Court Review an Issue of Professionalism?

Judges can review an issue of professionalism when a potentially unprofessional act occurs in the judge's presence or when the issue is brought to the court's attention.

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The extent of the court's review will depend on the unique circumstances of each case. Keep in mind, however, that the court can on its own initiative inquire into conduct occurring outside the courtroom that appears to be unprofessional. For example, a constant flow of discovery or pretrial motions, especially when the motions are permeated with claims of unprofessional conduct, could result in the court ordering the attorneys to attend a hearing to explain their conduct. Judges do monitor their cases, and they will not look well upon conduct that clearly does not advance the merits of the case but instead could lead to unnecessary motions, delays in completing discovery, or unnecessarily prolonging the case. In federal court, a judge can shift to the parties the expense created by uncooperativeness by appointing a special master to preside over the parties' discovery activities, see FRCP 53(a)(1) (C), and requiring the parties to bear cost of the special master. See FRCP 53(a)(3).

How Should the Court Respond to an Issue of Professionalism?

This depends on the circumstances of the unprofessional conduct. First, the easy situation is when the conduct occurs in the judge's presence; the judge can often address it with an appropriate admonition. Remember that both state and federal courts in Oregon have established written expectations for professional behavior by lawyers, and the judge can give a pointed reminder of those expectations to the lawyer or lawyers. This could occur in the jury's presence, and while judges might try to avoid admonishing an attorney in the jury's presence, the attorney can always avoid such embarrassment by refraining from the behavior in the first place. Ultimately, the court must preserve the dignity of the court in the eyes of the jury and public in general, and doing that could require taking appropriate actions in front the jury or on the record.

Second, the court can address unprofessional content in lawyers' written submissions, either in the court's written decision or at hearing. Judges can remind counsel — on or off the record — that such language in a brief is neither helpful to the court nor professional.

Third, if a motion presents substantive violations of ethics, statutes or rules of procedure or evidence that also happen to be instances of unprofessional conduct, then the court can rely on those standards in imposing a commensurate sanction. See, for example, 28 U.S.C. § 1927 (sanctions for unreasonable or vexatious litigation conduct); FRCP 11(c) (sanctions); ORCP 17 D (same); FRCP 37 (expenses, sanctions, and expenses on failure to admit); ORCP 46 (same); UTCR 1.090(2) (sanctions for failure to comply with UTCR or SLR); UTCR 19 (contempt).

Fourth, if the judge anticipates issues of professionalism may arise in a case, there are always pretrial management procedures and rules for asserting greater control over the lawyers and their clients. See, for example, FRCP 16 (pretrial and scheduling conference); UTCR 6.010 (conferences in civil proceedings); Multnomah County SLR 6.014 (pre-trial case management conferences in civil actions).

Why is it a Challenge for Judges to Address Issues of Professionalism?

Most incidents of unprofessional conduct occur outside the presence of the judge. As an example, a discovery motion often involves accusations and counter-accusations, such that by the time it reaches the judge it's usually impossible to determine who, if anyone, is at fault.

Also, a potential incident of unprofessional conduct often has a limited factual record from which a judge may make determinations and, if there is a factual record, it may be dense with detail. It's difficult, sometimes impossible, and always time-consuming, for judges to try to determine who "started it." Thus, keep in mind that if you file a discovery motion that involves such conduct as a component of the dispute, you may well be disappointed in the outcome. Simply put, time constraints often force judges to move past such allegations and focus on promptly resolving the discovery dispute so that the parties can get on with discovery and the case will continue to move forward.

Further, the claimed conduct may be a culmination of discrete actions rather than a distinct and overt incident, making particularly difficult the determination of whether there was any unprofessional conduct at all. Judges don't live with a case the way lawyers do; they don't regularly interact with the lawyers on all matters pertaining to the case, and thus, they don't share the accusing lawyer's sense of frustration or even anger over the relationship with opposing counsel. What might look like unprofessional conduct to the accusing lawyer with many months of personal experience might look different to the judge reading the motion.

Finally, keep in mind that the source of the unprofessional conduct may become unclear if the accusing lawyer responds in similarly unprofessional fashion. Before you file a motion that involves allegations of unprofessional conduct by the other lawyer, and especially if you are seeking sanctions, first make sure that the other lawyer will not be able to say the same of you in his or her response. If she can, then don't be surprised when the judge denies your motion or admonishes both sides for unprofessional conduct.

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon.

View From The Bench

Senior Judge Dan Harris

Enduring values

By Hon. Dan Harris
Senior Judge

I tried one of the most significant cases of my career in 1991. It involved a wrongful death action arising out of a crash on the Siskiyou Pass. The stakes were high. The competition between attorneys was intense. It wasn't the ultimate verdict that made it significant for me, it was the experience I had with the other jurists. The judge and the three other attorneys involved in this case all graduated from law school in the 1940s and 1950s. What I observed from this experience gave me a better understanding of what our profession was like a generation ago and how it has changed.

In this case I observed a judge and lawyers who showed great respect for each other. They were courteous at all time to all involved in the process. They were all well prepared and expected everyone else to be prepared. The lawyers freely extended professional courtesies and relied on verbal agreements with each other through out the process. They always kept their word. They played by the rules. There was no fudging or corner cutting. They maintained a steady and professional demeanor and appearance — even in the most intense situations — and exercised great restraint and control when it came to what they said, how they said it and what they objected to. The lawyers regularly conferred when issues would arise and only came to the judge when they couldn't fashion a solution themselves.

Now I understand, more than 25 years ago, I was witnessing practices and traditions that characterized our profession a generation ago, when the practice of law was viewed more as an "esteemed profession" and a "calling."[1] We have witnessed our profession become more of a business and a career. I have observed this change accelerate since I entered the profession in the early 1980s, especially from my perspective on the bench where I have had the opportunity to regularly observe the performance of lawyers.

Trying to go back to reclaim our profession's place in society, or recapture some of the traditions of generations past, is not realistic. We have to look forward and work at preserving those practices and values that have always worked for lawyers: credibility, competence, restraint and loyalty.

Credibility

A lawyer's credibility is everything in this profession. Credibility is earned from hard work, ethical practice and a believable and accurate advocacy. Some lawyers, in the heat of competition, are tempted to fudge with the facts or the law. Some lawyers will insert provisions into proposed judgments that go beyond the court's directive. Some lawyers cannot avoid the temptation to pass on information to a judge's staff that constitutes an *ex parte* contact. All of these practices undermine a lawyer's reputation. Once a reputation sets in for fudging, it is thereafter difficult to regain credibility with attorneys and judges. As stated by Justice John Paul Stevens: "An advocate who does not command the confidence of the judge bears a much heavier burden of persuasion than one who never misstates either the facts or the law."[2]

A lawyer's professional reputation is the currency of our profession. Work diligently at building it up and guard it at all costs. Then spend it frugally and wisely. And should you make a mistake that might diminish your reputation, do whatever you have to do to make amends, including the simple act of offering an apology.

Let your legal communications stand on their own legal footing without resorting to expressions of opinion or overstatement. Too often, attorneys use useless words, like "outrageous" or "ludicrous," to argue their point. This hurts rather than helps their arguments and takes away from the respect the court has for the analysis. Keep it objective and to the point.

Competence

The competent lawyer is first and foremost prepared. The process of pre-

paring for trial is usually much more than the trial itself. Devoting the necessary time to preparation will not only improve your chances of success but, more importantly, will establish a credibility and reputation that will serve you well in the long run. An important part of preparation should include the practice of stipulating with opposing counsel on as many aspects of the trial as possible. Anticipate evidentiary issues and attempt to work out agreements in advance. In many cases you can stipulate in advance to most of the exhibits, to the order of witnesses, to the appropriate resolution of evidentiary issues and to the jury instructions.

Develop a reputation for knowing the rules of procedure and evidence, and the basic skills used in court. Too many lawyers "wing it" too often. This will undermine your effectiveness as an advocate. Know and practice the fundamental procedures followed in trial: from jury selection to opening statements, to offering exhibits into the record to effective cross examination to making the closing argument.

In the end, you want the judge to say in his or her mind: I know this person. This lawyer is always well prepared, anticipates and tries to resolve in advance issues at trial, has talked with opposing counsel about stipulations, tries an efficient and effect case, and doesn't test the patience of the judge or jury.

Restraint

You can enhance your reputation and effectiveness as an advocate with the appropriate exercise of patience and restraint. Here are a few examples:

- *Don't respond immediately to that sharply worded email or letter from opposing counsel.* Produce a draft response if you must but wait for a day or two before you actually respond. Your response will be more professional, objective and effective if you have the patience to delay your response. This is a difficult task in today's world of instant communication, but it will produce significant dividends.
- *Don't do something just because you can.* We all remember what Justice Potter Stewart once said: "Sometimes there is a big difference between what you have a right to do and what is right to do." Before you decide to deny a good faith request for an extension or take advantage of opposing counsel for a missed deadline, consider how your actions will impact your reputation or future relationship with the other attorney. "Live by the sword, die by the sword," is a maxim that applies to our profession. You will most certainly be in a position someday where you are counting on a fellow lawyer to show restraint by extending to you a professional courtesy.
- *Don't let your opponent control your behavior.* We've all been there, in the heat of the contest, where we want to respond in kind to the way opposing counsel is characterizing you or our client. Don't let your opponent take you away from your game plan. Your client deserves an objective, diligent advocate — not a hothead bent on getting even with the other lawyer.
- *Learn to disagree, agreeably.* Disagreements are inherent in our profession but they don't have to devolve into a war of strong words, accusations and overstatements. Keep your discussion over disagreements cordial and objective — you will be a more effective advocate. Shakespeare reminded us of the more desirable practice in The Taming of the Shrew. Adversaries in law, he wrote, "strive mightily, but eat and drink as friends."

Loyalty

We have an ethical duty of loyalty to represent clients with competence and diligence, while maintaining confidences and avoiding conflicts of interest. This duty should be taken very seriously. The duty to loyalty does not, however, require you to be a puppet to your client's wishes. In the interest of preserving your credibility and reputation, you must insist at all time on being a counselor who balances a client's interests with your professional goals. Too many lawyers will "perform" for their clients by saying or writing things that aren't effective or credible. This may please a client in the short run but it almost always harms the client's interests, and the attorney's reputation, in the long run. Frankly, your reputation and credibility will rise or fall based on your ability to manage a client's expectations and demands.

Our duty to loyalty also includes an obligation to advise clients of the most efficient way to resolve the dispute. This should include apprising clients of the availability of mediation and other methods for resolving issues outside the courtroom. Clients should be informed of the effect litigation will have on them and the benefits — financial and otherwise — that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost.

Our approach to the practice of law has rapidly transitioned from a time exemplified by Atticus Finch into the 21st Century. Our profession is now very different in many ways, but fundamental values endure. They endure because employing these values will improve your effectiveness as an advocate while increasing the personal satisfaction you derive from your work.

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[1] The place of lawyers in American society has been recognized as holding a unique position of moral leadership since the founding of this Country. Alexis de Tocqueville in his famous study of American law and customs referred to lawyers as the Country's natural aristocracy.

[2] John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting. 12 St. John's J. L. Comm. 21 (1996).

Dan Harris is a retired Jackson County Circuit Court Judge and now fills in as a senior judge as needed around the state. He also serves as a mediator and arbitrator with Harris Mediation & Arbitration, PO Box 51444, Eugene, OR 97405. You can reach him at harrismediator@gmail.com or 541-324-1329.

H

United States Court of Appeals,
Ninth Circuit.
Amir Cyrus AHANCHIAN, an individual, Plaintiff-Appellant,
v.
XENON PICTURES, INC., a Delaware corporation; CKrush, Inc., a Delaware corporation; Sam Maccarone, an individual; Preston Lacy, an individual, Defendants-Appellees.
Amir Cyrus Ahanchian, an individual, Plaintiff-Appellant,
v.
Xenon Pictures, Inc., a California corporation; CKrush Inc., a Delaware corporation; Sam Maccarone, an individual; Preston Lacy, an individual, Defendants-Appellees.

Nos. 08-56667, 08-56906.
Argued and Submitted Feb. 2, 2010.
Filed Nov. 3, 2010.

Background: Writer brought copyright infringement action against movie's distributor, production company, director, and screenwriter, alleging defendants used in the movie several skits he authored without his permission. The United States District Court for the Central District of California, John F. Walter, J., denied writer's motion for extension of time to file opposition to defendants' summary judgment motion and motion to accept late-filed opposition, and subsequently granted defendants' motions for summary judgment and attorneys' fees. Writer appealed.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:
(1) writer demonstrated good cause for filing late opposition to defendants' summary judgment motion, and thus grant of extension of time to file opposition was warranted, and
(2) writer's delay in filing opposition to defendants' summary judgment motion was result of excusable neglect, and thus grant of motion to allow late-filed opposition was warranted.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B 813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Federal Courts 170B 829

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk829 k. Amendment, vacation, or relief from judgment. Most Cited Cases

The district court's denial of an extension of time is reviewed for abuse of discretion, as is a court's denial of a motion for relief from judgment. Fed.Rules Civ.Proc.Rules 6(b), 60(b), 28 U.S.C.A.

[2] Federal Courts 170B 812

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 k. Abuse of discretion. Most Cited Cases

Under abuse of discretion standard of review, Court of Appeals reverses where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record.

[3] Federal Civil Procedure 170A 923

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak923 k. Time for filing. Most Cited Cases

Rule governing enlargement of time, like all the Federal Rules of Civil Procedure, is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 923

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak923 k. Time for filing. Most Cited Cases

Requests for extensions of time made before the applicable deadline has passed should normally be granted in the absence of bad faith or prejudice to the adverse party. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

[5] Copyrights and Intellectual Property 99 89(2)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k89 Judgment
99k89(2) k. Summary judgment. Most Cited Cases

Writer moving for one-week extension of time to file opposition to defendants' dispositive motion for summary judgment demonstrated good cause for filing late opposition, and thus grant of extension of time to file opposition was warranted in copyright infringement action, absent any showing of bad faith or prejudice to defendants; deadline for filing opposition was exceptionally constrained due to peculiar dictates of local rules, deadline followed immediately upon Labor Day weekend and writer had only five business days to respond to defendants' motion, and writer's counsel was out-of-state in fulfillment of previously-scheduled political commitment from day defendants chose to file their motion through day opposition was due. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

[6] Copyrights and Intellectual Property 99 89(2)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k89 Judgment
99k89(2) k. Summary judgment. Most Cited Cases

District court, in considering writer's motion to allow late-filed opposition to defendant's dispositive motion for summary judgment in copyright infringement action, was required to apply four-factor equitable test to determine whether writer's failure to meet filing deadline constituted "excusable neglect." Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[7] Federal Courts 170B 611

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk611 k. Necessity of presentation in general. Most Cited Cases

General rule that a party will be deemed to have waived any issue or argument not raised before the district court does not apply where the district court nevertheless addressed the merits of the issue not explicitly raised by the party.

[8] Federal Civil Procedure 170A 923

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General

170Ak923 k. Time for filing. Most Cited Cases

To determine whether a party's failure to meet a deadline constitutes "excusable neglect," courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[9] Copyrights and Intellectual Property 99 89(2)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k89 Judgment
99k89(2) k. Summary judgment. Most Cited Cases

Writer's delay in filing his opposition to defendant's dispositive motion for summary judgment was result of excusable neglect, and thus grant of motion to allow late-filed opposition was warranted in action alleging copyright infringement, even though calendaring mistake, which was partial cause of late filing, was weak justification for delay, since defendants were not prejudiced by late filing, length of delay was mere three days and would not have adversely affected either the summary judgment hearing date or trial date, and there was no indication that writer's failure to file opposition on time was result of bad faith. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

***1254** Jeffery J. Daar, Daar & Newman, PC, Los Angeles, CA, for the plaintiff-appellant, Amir Cyrus Ahanchian.

Leonard S. Machtinger, Kenoff & Machtinger, LLP, Los Angeles, CA; Richard L. Charnley, Terry Anastassiou and Ernest E. Price, Ropers, Majeski, Kohn, & Bentley, Los Angeles, CA, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding. D.C. No. 2:07-cv-06295-JFW-E.

Before: ANDREW J. KLEINFELD, KIM McLANE WARDLAW and CONSUELO M. CALLAHAN, Circuit Judges.

OPINION

WARDLAW, Circuit Judge:

Procedure "is a means to an end, not an end in itself-the 'handmaid rather than ***1255** the mistress' of justice." Charles E. Clark, *History, Systems and Functions of Pleading*, 11 Va. L.Rev. 517, 542 (1925). While district courts enjoy a wide latitude of discretion in case management, this discretion is circumscribed by the courts' overriding obligation to construe and administer the procedural rules so as "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. These consolidated appeals arise from a district court's refusal to exercise discretion consistent with the dictates of Rule 1.

Amir Cyrus Ahanchian's counsel moved for a one-week extension of time to file his opposition to defendants' summary judgment motion, citing as good cause: (1) the extremely short eight day response deadline (with three of those days falling over a federal holiday weekend) created by the combination of an unusual local rule and defendants' litigation tactics; (2) his preplanned absence, beginning the day defendants filed the motions, in fulfillment of an out-of-state commitment; and (3) the large number of supporting exhibits attached to defendants' motion. Defense counsel, without regard to the previous professional courtesies extended to him by Ahanchian's counsel, vigorously opposed the extension. Despite the presence of what most reasonable jurists would regard as good cause and the absence of prejudice to anyone, the district court denied the motion. Even so, Ahanchian's counsel managed to file the opposition, albeit three days late, due to a calendaring mistake and com-

puter problems, along with a motion asking that the district court accept the late-filed opposition. Five days later, the district court construed that motion as one for reconsideration under Rule 60(b), and, applying an incorrect legal standard, denied it. That same day, having plaintiff's opposition in hand, but refusing to consider it, the district court granted defendants' motion for summary judgment, failing to provide any legal reasoning or citation to law or facts.[FN1] To add injury to insult, the district court awarded defense counsel $247,171.32 in attorneys' fees. We conclude that the district court abused its discretion in denying both the request for an extension of time and the motion to accept the late-filed opposition, and erred in granting defendants' motion for summary judgment and in awarding attorneys' fees to defense counsel.

FN1. Ahanchian does not argue that we should reverse the district court for its failure to provide any reasoning in its order granting summary judgment. However, we have held this alone is reversible error, because it precludes us from conducting a meaningful review of the district court's order. *See Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir.1998) (en banc) (noting that remand is appropriate where the district court fails to "make a sufficient record of its reasoning to enable appellate review"). Nonetheless, we have reviewed the district court record in its entirety and reverse in part and affirm in part the award of summary judgment in the memorandum disposition filed concurrently with this opinion. We also vacate the award of attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

These appeals arise from the creation of the movie National Lampoon's TV: *The Movie*, theatrically released in November 2006. Unlike traditional films, this movie eschews plot or character development, instead lampooning several high profile television programs in a series of independent comedic skits. This lawsuit involves the disputed authorship of a number of these skits. Ahanchian claims that ten skits he authored (and subsequently copyrighted) either appear verbatim in the movie or serve as the basis for skits included in the final version of the movie.

***1256** Ahanchian filed a complaint on September 17, 2007 against Sam Maccarone (director and writer of the film), Preston Lacy (writer and actor), Xenon Pictures, Inc. (distributor), and CKrush, Inc. (producer) asserting causes of action for copyright infringement, breach of an implied contract, and unfair competition in violation of the Lanham Act. Apparently, Maccarone and Lacy were difficult to locate. Defense counsel for Xenon Pictures, who had been appointed by the district court to represent Maccarone and Lacy, sought additional time to answer Ahanchian's complaint on their behalf. Exhibiting the professional courtesy expected of officers of the court, Ahanchian's counsel stipulated to an extension of time-which stipulation the district court then rejected.

On January 7, 2008, the district court issued its scheduling order establishing, among other deadlines: November 18, 2008, as the date for the commencement of trial; September 2, 2008, as the discovery cut-off date; and September 15, 2008, as the last day for hearing motions. Maccarone and Lacy did not file their answer to the complaint until June 30, 2008. Because of Maccarone and Lacy's late entrance into the litigation, the parties entered into a joint stipulation on July 9, 2008, seeking to extend by twelve weeks all the deadlines established by the scheduling order to allow more time for discovery. The district court again denied the stipulated extension of time, finding that the parties had failed to demonstrate good cause as to why discovery could not be completed by September 2, 2008.

Because the district court's scheduling order set September 15, 2008, as the last day for hearing motions, the local rules in force at the time made August 25, 2008, the last date to file any motion for

summary judgment. *See* C.D. Cal. Local R. 6-1 (2008) (requiring that any motion be filed within twenty-one days before the hearing date). Though there is no indication in the record that they did so, the defendants assert that they informed Ahanchian's counsel on August 6, 2008, that they would be filing a motion for summary judgment. On August 25, 2008, the last possible day for filing, the defendants moved for summary judgment seeking dismissal of all of Ahanchian's claims and for terminating sanctions resulting from a discovery dispute. These motions were accompanied by roughly 1,000 pages of supporting exhibits and declarations. Because the defendants chose to wait until the last day to file their motions, the local rules operated to set a deadline of September 2, 2008-the day after Labor Day-for Ahanchian to review these materials and to prepare and file his oppositions. Ahanchian, therefore, was left with a mere eight days, three over the Labor Day weekend, to draft his oppositions to the motions. *See* C.D. Cal. Local R. 7-9 (2008) (requiring any opposition to be filed no later than fourteen days before the hearing date); Fed.R.Civ.P. 6(a)(1)(C) (extending deadlines by an additional day where a deadline would otherwise fall on a holiday). Also, Ahanchian's lead counsel was scheduled to travel out of state on August 25 to fulfil a previously-scheduled commitment.[FN2]

> FN2. On appeal, Ahanchian's counsel revealed that his trip was required because he was serving as a duly-elected California state delegate to a major political party's national convention. *See* Cal. Elec.Code § 6201.

Given the already unreasonably strained deadlines, within which fell an out-of-state commitment and Labor Day weekend, on August 28, 2008, Ahanchian asked defense counsel to stipulate to a one-week continuance of the hearing date for defendants' motions, along with corresponding one-week extensions of the deadlines for Ahanchian to file oppositions and for defendants***1257** to reply. Defense counsel refused to so stipulate. The very next day, on August 29, 2008, Ahanchian filed an ex parte application pursuant to Local Rule 7-19 seeking a one-week extension. Ahanchian recited as good cause for the requested extension of time that: (1) defendants had waited until the last day to file their motions, choosing to file four days before the Labor Day weekend, and with knowledge of pending depositions; (2) the accompanying motions and exhibits amounted to 1,000 pages of materials; (3) Ahanchian's lead counsel had left the state on August 25 on a prescheduled trip and would not be returning until September 2; and (4) Ahanchian, who was needed to respond to the motion, was also out of town over Labor Day weekend. Ahanchian noted that "[n]o party will suffer any prejudice" should the court grant the continuance.

Defendants opposed the motion, arguing that Ahanchian had failed to demonstrate "good cause." Specifically, they argued that Ahanchian's counsel "knew (or should have known) that the motions would be filed *no later than August 25*-and yet, for reasons unexplained, this is precisely the date plaintiff's counsel decided to travel 'out of state.' Why? No reason is offered." In a footnote, the defendants posed some hypothetical possibilities: "A family emergency? A conflicting work-related priority? Or a vacation to Mexico? The point is, it is not explained. Absence [*sic*] explanation, good cause cannot be discerned." As for prejudice, defendants made the weak and false arguments that the requested continuance would give Ahanchian "several weeks to prepare an Opposition," and yet defendants would have only one week to file their reply. They also asserted that they would have "less time to prepare for trial." In point of fact, Ahanchian had requested extensions of time to file both his opposition and for the defendants' replies. Had Ahanchian's request been granted, defendants would have had the full time allowed by the local rules to reply. Moreover, the trial was not scheduled to commence for another three months.

Ahanchian ultimately filed his opposition to the summary judgment motion three days late, on

September 5, 2008,[FN3] at which time he also filed an ex parte application seeking permission to make the late filing.[FN4] On September 8, 2008, defendants responded by reiterating their opposition to any extension of time, and urging the district court to "ignore" the late opposition. They further suggested that Ahanchian's counsel's representation that he believed the deadline was September 4 was disingenuous, and that Ahanchian had failed to adequately explain the technical computer problems that had resulted in the one-day delay.

> FN3. Ahanchian's opposition to the Motion for Terminating Sanctions was filed two days earlier, on September 3.
>
> FN4. In this application, Ahanchian's counsel explained that his office had made a calendaring error, and thus he erroneously believed that the oppositions were not due until September 4, 2008. The truth of this statement is supported by counsel's earlier application seeking an extension of the deadlines, which represented that "Plaintiff's opposition papers are currently due on September 4, 2008." Neither defense counsel nor the court chose to alert counsel that he had misstated the deadline, adding two days. Counsel also explained he attempted to meet that erroneously-calculated deadline but "due to technical computer circumstances beyond control," he could not file until September 5.

On September 10, 2008, in a three-paragraph order, the district court granted defendants' summary judgment motion in full. It simultaneously denied Ahanchian's ex parte motion, concluding, without citing any record support, that Ahanchian, "apparently***1258** not pleased with the court's ruling," had simply failed to file timely oppositions. The court construed Ahanchian's September 5, 2008, ex parte application as a Federal Rule of Civil Procedure 60(b) motion for reconsideration of its denial of Ahanchian's August 29, 2008, request for a one-week extension. The court then denied the motion, citing three authorities: (1) a Fifth Circuit decision concluding that the "inadvertent mistake" of counsel was not a sufficient ground to excuse missing a filing deadline; (2) a Sixth Circuit decision rejecting "calendaring errors" as justification for reconsideration; and (3), finally, an inapposite Ninth Circuit decision that suggests a party should sue its lawyer for malpractice rather than bring a Rule 60(b)(1) motion when it comes to regret an action based on erroneous legal advice.

Meanwhile, in its summary judgment order, the court correctly observed that Ninth Circuit precedent bars district courts from granting summary judgment simply because a party fails to file an opposition or violates a local rule, and also correctly cited its obligation to analyze the record to determine whether any disputed material fact was present. It then effectively flouted both legal principles,[FN5] stating that it had reviewed only the defense evidence, even though it knew the opposition papers were already filed, having ruled upon the accompanying motion for a late filing. Unsurprisingly, based on only defendants' version of the facts, the court concluded that defendants were not liable on any claim and granted judgment in their favor.

> FN5. For example, even without considering the late-filed opposition papers, the record then before the district court included the certificates of copyright registration, which are prima facie evidence of ownership and which should have precluded an award of summary judgment on Ahanchian's copyright claims.

Ahanchian timely appeals the district court's procedural rulings, the grant of summary judgment, and the award of attorneys' fees.

II. STANDARD OF REVIEW

[1][2] The district court's denial of an extension of time pursuant to Federal Rule of Civil Procedure 6(b) is reviewed for abuse of discretion, *see Kyle v. Campbell Soup Co.*, 28 F.3d 928, 930 (9th Cir.1994), as is a court's denial of a Rule 60(b) mo-

tion, *see United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir.2005). Accordingly, we reverse where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir.2009) (en banc).

III. DISCUSSION

Ahanchian argues that the district court abused its discretion first in denying his request for a one-week extension of time to file his opposition to defendants' summary judgment motion and then in denying his application to file that opposition late. We agree.

A.

[3][4] Federal Rule of Civil Procedure 6(b)(1) provides:

> (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Fed.R.Civ.P. 6(b)(1). This rule, like all the Federal Rules of Civil Procedure, "[is] to ***1259** be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir.1983) (quoting *Staren v. American Nat'l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir.1976)); *see also* Fed.R.Civ.P. 1 ("[The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Consequently, requests for extensions of time made before the applicable deadline has passed should "normally ... be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d ed. 2004).

[5] The circumstances of Ahanchian's predicament clearly demonstrate the "good cause" required by Rule 6(b)(1). "Good cause" is a non-rigorous standard that has been construed broadly across procedural and statutory contexts. *See, e.g., Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir.2004); *Thomas v. Brennan*, 961 F.2d 612, 619 (7th Cir.1992); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir.1987). To begin with, Ahanchian faced an exceptionally constrained deadline resulting from the peculiar dictates of the local rules for the Central District of California. [FN6] Compounding the problem, this deadline followed immediately upon Labor Day weekend-during which even the federal courts are closed. By taking advantage of the unusual local rules, defendants cut Ahanchian's time to respond to two dispositive motions to five business days and three days over the holiday weekend. *See* Fed.R.Civ.P. 6(a)(1)(C). As was certainly neither unreasonable nor unexpected, both Ahanchian and his attorney were out of town over Labor Day weekend, and, moreover, as he informed the district court, Ahanchian's lead counsel was out-of-state in fulfillment of a previously-scheduled commitment from the day defendants chose to file their motions through the day the responses were due. [FN7]

> FN6. Like the rules in several districts in this circuit, the Central District Local Rules establish deadlines for filing motions and oppositions by counting backwards from an established hearing date. In 2008, Central District of California Local Rule 6-1 provided that any motion had to be filed "not later than twenty-one (21) days before the date set for hearing." C.D. Cal. Local R. 6-1 (2008). Similarly, Central District Local Rule 7-9 governed the filing

of oppositions and provided that any opposition had to be filed "not later than fourteen (14) days before the date designated for the hearing of the motion." C.D. Cal. Local R. 7-9 (2008). As a result, where the movant chose to file a motion twenty-one days before the hearing-the last day allowed by local rules-the nonmovant has a mere seven days to file an opposition. This abbreviated timeline is unusual; every other district in this circuit guarantees nonmovants at least fourteen days to file an opposition to a motion. *See* D. Ariz. Local R. 56.1(d); D. Alaska Local R. 7.1(e); E.D. Cal. Local R. 78-230(b); N.D. Cal. Local R. 7-2(a), 7-3(a); S.D. Cal. Local R. 7.1(e)(1), (2); D. Guam Local R. 7.1(d); D. Hawaii Local R. 7.2(a), 7.4; D. Idaho Local R. 7.1(c); D. Mont. Local R. 7.1(d)(1)(B); D. Nevada Local R. 7.2(b); D.N. Mariana Islands Local R. 7.1(c)(2); D. Oregon Local R. 7.1(f); E.D. Wash. Local R. 7.1(c); W.D. Wash. Local R. 7(d)(3).

FN7. Even without the revelation that Ahanchian's lead counsel's absence was due to his position as an elected delegate to a major political party's national convention, his lack of availability due to a previously planned trip is a reasonable basis for seeking an extension of time. As Supreme Court Justice David Brewer once recognized, attorneys have an obligation as professionals to assume positions of important social responsibility. *See* David J. Brewer, *The Ideal Lawyer*, Atlantic Monthly, November 1906, at 587, 598 ("[T]he true lawyer never forgets the obligations which he as a lawyer owes to the republic, ... he always remembers that he is a citizen."). Moreover, attorneys, like everyone else, have critical personal and familial obligations that are particularly acute during holidays. It is important to the health of the legal profession that attorneys strike a balance between these competing demands on their time. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L.Rev. 871, 889-90 (1999).

***1260** Critically, the record is devoid of any indication either that Ahanchian's counsel acted in bad faith or that an extension of time would prejudice defendants. To the contrary, the record reflects that Ahanchian's counsel acted conscientiously throughout the litigation, promptly seeking extensions of time when necessary and stipulating to defendants' earlier request for an extension of time to file their answer and to the twelve-week extension due to two defendants' late appearances. Moreover, defendants' argument that they would be prejudiced by only having a week to reply while Ahanchian would have had several weeks to draft an opposition is unpersuasive and neglects the fact that in the overwhelming majority of districts, more time is given for drafting oppositions than for drafting replies. *See, e.g.*, N.D. Cal. Local R. 7-3(a), (c); S.D. Cal. Local R. 7.1(e)(1), (2). Had the district court had any doubts about the veracity or good faith of Ahanchian's counsel, or been worried about prospective prejudice, it could have held an evidentiary hearing or sought more information; instead, without support in the record, it summarily denied Ahanchian's request.

The record shows that Ahanchian's requested relief was reasonable, justified, and would not result in prejudice to any party. The district court nevertheless denied Ahanchian's motion, thus effectively dooming Ahanchian's case on the impermissible ground that he had violated a local rule. Because Ahanchian clearly demonstrated the "good cause" required by Rule 6, and because there was no reason to believe that Ahanchian was acting in bad faith or was misrepresenting his reasons for asking for the extension, the district court abused its discretion in denying Ahanchian's timely mo-

tion.

B.

[6][7] We next turn to the district court's denial of Ahanchian's September 5, 2008, ex parte application to allow his late-filed opposition, which the court construed as a Rule 60(b) motion for reconsideration of its denial of Ahanchian's Rule 6 motion for an extension. Rule 60(b) provides that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding" on the basis of "mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b). The court denied Ahanchian's application after concluding that Ahanchian had not demonstrated "excusable neglect." In so doing, however, the district court failed to cite the correct legal standard, applying an incorrect legal standard for deciding Rule 60(b) motions.[FN8]

FN8. Defendants assert that Ahanchian waived this argument because he did not state in his application that he was relying on the "excusable neglect" standard or cite Rule 60(b). Defendants are correct that a party will be deemed to have waived any issue or argument not raised before the district court. *Ritchie v. United States,* 451 F.3d 1019, 1026 n. 12 (9th Cir.2006). However, this general rule "does not apply where the district court nevertheless addressed the merits of the issue" not explicitly raised by the party. *Blackmon-Malloy v. U.S. Capitol Police Bd.,* 575 F.3d 699, 707 (D.C.Cir.2009); *see also Citizens United v. F.E.C.,* --- U.S. ----, 130 S.Ct. 876, 888, --- L.Ed.2d ---- (2010). Here, despite Ahanchian's understandable failure to explicitly reference the excusable neglect standard in what he thought was a motion for late filing, and not a Rule 60(b) motion, the district court chose to construe his application as one brought pursuant to Rule 60 and purported to apply the excusable neglect standard. Ahanchian did not waive his argument that the district court abused its discretion in its application of Rule 60.

***1261** [8] To determine whether a party's failure to meet a deadline constitutes "excusable neglect," courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); *Briones v. Riviera Hotel & Casino,* 116 F.3d 379, 381 (9th Cir.1997) (adopting this test for consideration of Rule 60(b) motions). Through other decisions, including *Bateman v. U.S. Postal Serv.,* 231 F.3d 1220 (9th Cir.2000), and *Pincay v. Andrews,* 389 F.3d 853 (9th Cir.2004) (en banc), we have further clarified how courts should apply this test.

In *Bateman,* we concluded that when considering a Rule 60(b) motion a district court abuses its discretion by failing to engage in the four-factor *Pioneer/ Briones* equitable balancing test. *Bateman,* 231 F.3d at 1223-24. Bateman's counsel had left the country before filing an opposition to the Postal Service's summary judgment motion, allowed the deadline to pass while abroad, failed to file any motions for extensions of time, and failed to contact the district court for sixteen days after he returned because of "jet lag and the time it took to sort through the mail." *Id.* at 1223. Because the district court had already awarded summary judgment to the Postal Service, Bateman moved to set aside the judgment pursuant to Rule 60(b). *Id.* The district court, without mentioning the *Pioneer/ Briones* test, denied the motion after considering only facts relating to the reason for Bateman's delay-the third *Pioneer/ Briones* factor. *Id.* at 1224. We concluded that the district court had failed to engage in the equitable analysis mandated by *Pioneer* and *Briones,* and, by ignoring three of the four *Pioneer/ Briones* factors, had abused its discretion in denying Bateman's Rule 60(b) motion. *Id.; see also*

Lemoge v. United States, 587 F.3d 1188, 1192 (9th Cir.2009) ("We conclude that the district court did not identify the *Pioneer*- *Briones* standard or correctly conduct the *Pioneer*- *Briones* analysis and that this was an abuse of discretion.").

In *Pincay,* we held that courts engaged in balancing the *Pioneer/ Briones* factors may not apply per se rules. *Pincay,* 389 F.3d at 855 ("We now hold that per se rules are not consistent with *Pioneer*."). Defendants, who had filed their notice of appeal twenty-four days late, asserted that their tardy filing resulted from a calendaring mistake caused by attorneys and paralegals misapplying a clear legal rule. *See id.* Applying the same four-factor balancing test as required under Federal Rule of Civil Procedure 60(b), the district court found that defendants' neglect was excusable under Federal Rule of Appellate Procedure 4(a)(5). *See id.* Sitting en banc, we rejected the plaintiffs' contention that the district court had abused its discretion in ruling for defendants. We concluded that, while the calendaring mistake was not a "compelling excuse," because of the "nature of the contextual analysis and the balancing of the factors adopted in *Pioneer*," courts applying the *Pioneer/ Briones* test cannot create or apply any "rigid legal rule against late filings attributable to any particular type of negligence." *Id.* at 860.

The district court's failure to apply Ninth Circuit precedent, particularly the rules set forth in *Bateman* and *Pincay,* to Ahanchian's Rule 60(b) motion was error. Just like the district court in *Bateman,* the district court here neither cited nor applied the *Pioneer/ Briones* test, but instead based its decision solely on whether the reason for the delay-the third *Pioneer/ Briones* factor-could establish excusable neglect. By ignoring the other three factors, the district court abused its ***1262** discretion. *See Bateman,* 231 F.3d at 1224. The district court then compounded its legal error by concluding that "a calendaring mistake is the type of 'inadvertent mistake' that is not entitled to relief pursuant to Rule 60(b)(1)," impermissibly adopting a per se rule in applying the *Pioneer/ Briones* balancing test. *See Pincay,* 389 F.3d at 859-60.

[9] The district court's errors are particularly troublesome because our application of the correct equitable analysis convinces us that Ahanchian's delay was the result of excusable neglect. *See Bateman,* 231 F.3d at 1224 & n. 3. We start by recognizing that "Rule 60(b) is 'remedial in nature and ... must be liberally applied.' " *TCI Group Life Ins. v. Knoebber,* 244 F.3d 691, 696 (9th Cir.2001) (quoting *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir.1984)). With this standard in mind, we conclude that all four *Pioneer/ Briones* factors favor Ahanchian. First, the defendants would not have been prejudiced by a week's delay in the filing of the opposition and a concomitant week extension to file a reply. At most, they would have won a quick but unmerited victory, the loss of which we do not consider prejudicial. *Cf. Bateman,* 231 F.3d at 1225 (finding insufficient prejudice where defendants "would have lost a quick victory and, should it ultimately have lost the summary judgment motion ... would have to reschedule the trial date"). Second, the length of the delay was a mere three days; filing the opposition then would not have adversely affected either the summary judgment hearing date, which was ten days away, or the trial, which was two and a half months away. *Compare id.* (finding a delay of over a month "not long enough to justify denying relief"). Third, while a calendaring mistake caused by the failure to apply a clear local rule may be a weak justification for an attorney's delay, we have previously found the identical mistake to be excusable neglect. *See, e.g., Pincay,* 389 F.3d at 860. In fact, in *Bateman,* the attorney's reasons for his nearly month-long delay, the need to recover from jet lag and to review mail, were far less persuasive. Yet, we concluded that excusable neglect was established. *Bateman,* 231 F.3d at 1225. Fourth, there is no indication that Ahanchian's failure to file the opposition on time was the result of bad faith. Ahanchian's counsel displayed his (mistaken) belief that the oppositions were due on September 4, 2008, in his initial request for an ex-

tension of time. Thus, his reliance on the calendaring mistake was not a bad-faith, post-hoc rationalization concocted to secure additional time. Ahanchian's counsel had no history of missing deadlines or disobeying the district court's orders; in fact, he demonstrated a sensitivity to the court's orders and deadlines by promptly seeking extensions of time where necessary. We have found good faith in situations where attorneys acted far less diligently and conscientiously. *See id.* ("[Counsel] showed a lack of regard for his client's interests and the court's docket. But there is no evidence that he acted with anything less than good faith.").

By failing to apply the *Pioneer/ Briones* equitable balancing test and instead adopting an impermissible *per se* rule, the district court abused its discretion. *See Lemoge,* 587 F.3d at 1193 (citing *Hinkson,* 585 F.3d at 1261). Applying the correct legal standard, we conclude that Ahanchian's counsel sufficiently established that his failure to timely file the opposition to summary judgment was the result of excusable neglect, and that the motion to allow the late opposition should have been granted.

C.

Perhaps contributing to the district court's errors and certainly compounding the harshness of its rulings, defense counsel***1263** disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel's unrelenting opposition to Ahanchian's counsel's reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. *See Indep. Towers of Wash. v. Washington,* 350 F.3d 925, 929 (9th Cir.2003); *Iva Ikuko Toguri D'Aquino v. United States,* 192 F.2d 338, 367 (9th Cir.1951). Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian's counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian's counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. *See* Cal. Attorney Guidelines of Civility & Professionalism § 1 ("The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice."); *see also Marcangelo v. Boardwalk Regency,* 47 F.3d 88, 90 (3d Cir.1995) ("We do not approve of the 'hardball' tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice.").

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. *See Bateman,* 231 F.3d at 1223 n. 2 ("[A]t the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values."); *Peterson v. BMI Refractories,* 124 F.3d 1386, 1396 (11th Cir.1997) ("There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated."). Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries. *See* Cal. Attorney Guidelines of Civility & Prof. § 6.

CONCLUSION

The district court abused its discretion in denying Ahanchian's request for a one-week extension to file his opposition and erred in denying Ahanchian's motion to allow a three-day late-filed opposition it construed as a Rule 60(b) motion.[FN9] Ac-

cordingly, we **REVERSE** the district court's grant of summary judgment, vacate the district court's award of attorneys' fees, and **REMAND** this case for further proceedings.

> FN9. The district court also stated in a footnote that the denial was, in the alternative, based on a lack of good cause. This conclusion was also an abuse of discretion, as the above discussion demonstrates.

C.A.9 (Cal.),2010.
Ahanchian v. Xenon Pictures, Inc.
624 F.3d 1253, 2010 Copr.L.Dec. P 29,994, 77 Fed.R.Serv.3d 1253, 10 Cal. Daily Op. Serv. 13,936

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United States District Court, S.D. California.

LA JOLLA SPA MD, INC., Plaintiff,
v.
AVIDAS PHARMACEUTICALS, LLC, Defendant.

Case No.: 17-CV-1124-MMA(WVG)
|
Signed 08/30/2019

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ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

Hon. William V. Gallo, United States Magistrate Judge

***1** Incivility is a scourge upon the once-venerable legal profession and has unfortunately become increasingly more rampant in the profession in recent years. *See generally Lasalle v. Vogel*, 36 Cal. App. 5th 127 (Cal. Ct. App. 2019) (lamenting the state of the modern legal profession and discussing its degradation through the years). In today's combative, battle-minded society, the lay perception of a "good" attorney is someone who engages in the obstreperous, scorched-earth tactics seen on television and makes litigation for the opposing side as painful as possible at every turn. However, outside the fictional absurdities of television drama, attorneys in the real world—presumably educated in the law and presumably committed to upholding the honor of the profession–should know and behave much more honorably.

When unchecked, incivility further erodes the fabric of the legal profession. Judges rightfully expect and demand more of officers of the court, and rules exist to ensure that lack of civility does not hinder litigation and does not go unpunished. Thus, Courts are equipped to address incivility under appropriate circumstances. This case sadly presents the Court with such an opportunity—to address the atrociously uncivil and unprofessional conduct of an attorney whose behavior wantonly and unnecessarily multiplied proceedings and aggressively harassed opposing counsel far beyond any sensible measure of what could be considered reasonably zealous advocacy for a client. Such behavior before this Court will not be chalked up to being simply "just part of the game." As explained below, this Court GRANTS Plaintiff's motion for sanctions in the amount of $28,502.03.

I. BACKGROUND

Once the parties finally settled upon their current counsel earlier this year after a total of five sets of attorneys between them, the stage was set for the sanctions motion now pending before the Court. On January 9, 2019, the Court held a second Case Management Conference in which defense counsel Julie Chovanes participated the day after the Court approved her request to appear pro hac vice. (Doc. Nos. 52-53; 55 (Transcript of CMC).) Although the Court had allowed prior counsel to conduct discovery, they apparently had failed to take much discovery, and new Plaintiff's counsel, James Ryan, requested additional time to do so. Accordingly, this Court granted Plaintiff's motion to amend the original Scheduling Order and allowed the parties to take fact discovery until April 8, 2019 and take expert discovery until June 17, 2019. (Doc. No. 54 ¶ 7.)

A short few weeks later, the parties called this Court to mediate a discovery dispute. (Doc. Nos. 57-60.) However, the disputes did not end there, and the Court held additional discovery conferences on February 26, 2019 (Doc. Nos. 67-68); March 22, 2019 (Doc. Nos. 74-75); [1] April 1, 2019 (Doc. Nos. 78-80); April 10, 2019 (Doc. Nos. 81-82); May 3, 2019 (Doc. No. 88); and May 10, 2019 (Doc. No. 89). In all, this Court held seven discovery conferences in a short four-month period.

***2** As a result of these numerous disputes, the Court spent hours on teleconferences with Chovanes and Ryan, hearing arguments, and generally observing the demeanor and tenor of both attorneys. Because the Court was able to observe the attorneys' behavior on these conferences, the Court can now confirm that both of their demeanors and behavior during the deposition at the heart of the pending sanctions motion was consistent with how they conducted themselves during the discovery conferences. The Court

observed Plaintiff's attorney Ryan as consistently even-keeled and respectful—though at times frustrated—as he argued in favor of his client. He did not raise his voice, engage in any attacks against the other side or opposing counsel, and dispassionately argued his positions. Defense counsel Chovanes, however, displayed a wholly different demeanor. The Court witnessed Chovanes repeatedly raise her voice at Ryan and even the Court, continuously interrupt Ryan and this Court, and characterize Plaintiff's case as a "garbage case" on multiple occasions. Outside the presence of this Court, Chovanes repeatedly failed to meet and confer about discovery disputes, often stating she would respond at a later date but then failing to respond despite multiple efforts to follow up by Ryan. At times, Chovanes also simply ignored Ryan's meet and confer communications. Chovanes's general demeanor during teleconferences with the Court was consistently flippant, overly-aggressive, truculent, and quick to confrontation.

One aspect of the fact discovery process that led to a dispute was the deposition of Margaret Gardner, the founder and designated Rule 30(b)(6) witness for Defendant. Leading up to Gardner's deposition and the May 10, 2019 Mandatory Settlement Conference, Defendant sought to limit her deposition due to her health concerns. After receiving a physician's note, the Court ordered that the deposition take place in Philadelphia for seven hours and that it proceed in two-hour increments with 30-minute breaks. (Doc. No. 82.) Also at that discovery conference on April 10, 2019, Chovanes indicated she wished to seek a protective order to limit the scope and length of Gardner's deposition given Chovanes's belief that the deposition should not take "more than a few hours." The Court provided Chovanes the opportunity to file a motion for a protective order and set an April 15, 2019 deadline to do so. (Doc. No. 82 ¶ 2.) However, although Chovanes referenced filing a motion for a protective order several times, the motion was never filed and so a protective order never issued.

The deposition of Margaret Gardner took place on May 3, 2019 in Philadelphia, and Chovanes quickly set the tone for the day.[2] As Ryan opened the deposition by providing standard instructions ordinarily given in depositions—such as for Gardner and Ryan to speak in turn to avoid speaking over each other—Chovanes stated: "Objection to that preamble. No need to lecture my client." (Doc. No. 93-6 at 11.)[3] When Ryan shortly thereafter benignly advised Gardner that he would clarify any questions that she did not understand if she so requested, Chovanes stated: "Objection to the lecture." (*Id.* at 12.) And so began a protracted day of Ryan attempting to take Gardner's deposition while Chovanes continuously interrupted, lodged frivolous objections, improperly instructed Gardner to not answer questions, and extensively argued with Ryan. Chovanes's continuous, relentless interrupting Ryan's questioning also included an outburst by Chovanes, where she and Gardner left the room after Chovanes falsely and bizarrely accused Ryan of threatening Gardner.[4]

***3** Approximately two hours into the deposition, the parties successfully contacted this Court for a discovery conference regarding Chovanes's objections and instructions to Gardner. (Doc. No. 93-6 at 120:7-128:7.) Up to that point, Chovanes had repeatedly objected to Ryan's questions on relevance grounds, objected that his questions exceeded the scope of the Rule 30(b)(6) deposition notice, and objected that some of the questions were outside the scope of discovery. Based on these objections, Chovanes had repeatedly instructed Gardner to not answer Ryan's questions. The Court instructed the parties to continue the deposition, preserve objections, and told the parties that objections based on scope and relevance were not proper bases to instruct Gardner to not answer questions. The deposition thus continued, and the parties did not contact the Court again that day.

After the discovery conference with the Court, Chovanes stopped instructing Gardner to not answer questions but continued to interrupt and make objections of various kinds. She also continued to relentlessly argue with Ryan, constantly trying to hurry up his questioning, making frivolous objections, making objections that made no sense in the context of a deposition, and instructing Ryan how he should ask questions and conduct the deposition.

The deposition was recorded by a videographer and a stenographer. As part of its sanctions motion, Plaintiff submitted video clips and the entire transcript of the deposition. Plaintiff divided the interruptions into six categories and provided 128 video clips encompassing 133 examples of behavior that Plaintiff contends cumulatively warrant sanctions.[5] (Doc. No. 93-2.) Defendant filed an opposition to the sanctions motion, but despite the opportunity, provided no video clips in rebuttal.

After the deposition, Ryan sought and was granted leave to file a motion for sanctions after his attempts to meet and confer with Chovanes about sanctions failed. Ryan now seeks $28,502.03 in sanctions pursuant to Federal Rule of Civil

Procedure 30(d)(2), 28 U.S.C. § 1927, and the court's inherent power to sanction.

In response, Defendant contends sanctions are not warranted because Ryan was able to ask questions and concluded the deposition by confirming he had no further questions. Defendant argues Chovanes's conduct did not result in prejudice to Plaintiff. Continuing Chovanes's personal attacks on Ryan at the deposition, Defendant's opposition papers contend that Ryan was unprepared near the end of the deposition because of the pauses between his questions, he was "wasting time," and contends it was proper for Chovanes to note these things for the record to protect Gardner from "further abuse." (Doc. No. 94 at 4-5.) With respect to the amount of sanctions Plaintiff seeks, Defendant does not address any specific components of the sanctions amount, instead asserting that there's a lack of documentary evidence to support the entire amount. Defendant also notes a discrepancy with respect to the date on which Ryan travelled to Philadelphia, though there is no dispute that he did in fact travel there for the deposition.

The Court held a hearing on the sanctions motion on August 16, 2019 and heard argument from Chovanes and Ryan. Chovanes continued to deny any impropriety, did not present any new evidence, and did not challenge any specific monetary component of the amount of sanctions Plaintiff seeks. She did not defend her conduct. She did not show any remorse. And she again characterized Plaintiff's case a "garbage case." This Order follows.

II. LEGAL STANDARD

A. Sanctions Under Federal Rule of Civil Procedure 30(d)(2)

***4** Under Rule 30(d)(2), a court may "impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 30's advisory committee notes make clear that the sanction may be imposed on parties and attorneys alike. District courts within the Ninth Circuit have held that Rule 30(d)(2) sanctions do not require a finding of bad faith. *See, e.g.*, *BNSF Ry. Co. v. San Joaquin Valley R.R. Co.*, No. 08CV1086-AWI-SMS, 2009 U.S. Dist. LEXIS 111569, at *9 (E.D. Cal. Nov. 17, 2009); *Robinson v. Chefs' Warehouse*, No. 15CV5421-RS(KAW), 2017 U.S. Dist. LEXIS 40824, at *7 (N.D. Cal. Mar. 21, 2017), on reconsideration, 2017 U.S. Dist. LEXIS 93339 (N.D. Cal. June 16, 2017).

B. Sanctions Under 28 U.S.C. § 1927

Under 28 U.S.C. § 1927, any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 thus provides the Court the authority "to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings." *Gadda v. Ashcroft*, 377 F.3d 934, 943 n.4 (9th Cir. 2004).

Section 1927 indicates that actions that multiply the proceedings must be both unreasonable and vexatious, and the Ninth Circuit has also stated that recklessness alone will not suffice; what is required is recklessness plus something more —for example, knowledge, intent to harass, or frivolousness. *See Thomas v. Girardi*, 611 F.3d 1027, 1061 (9th Cir. 2010) (reckless plus intentionally misleading); *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1221-22 (9th Cir. 2010) (cumulative acts over five years evidenced a pattern of recklessness and bad faith warranting sanctions); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (recklessness plus knowledge); *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) (recklessness plus frivolousness, harassment, or improper purpose). "Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989) (internal citations omitted). Indeed, "[e]ven if an attorney's arguments are meritorious, his conduct may be sanctionable if in bad faith." *Id.* (citation omitted).

C. "Inherent Powers" Sanctions

The Supreme Court in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), delivered the definitive summary of the bases on which a federal court may levy sanctions under its inherent power. The Court confirmed that federal courts have the inherent power to levy sanctions, including attorneys' fees, for "willful disobedience of a court order ... or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons...." 447 U.S. at 766 (internal quotation marks and citations omitted). The Court also noted that a court "certainly may assess [sanctions] against counsel who willfully abuse judicial processes." *Id.* The Court later reaffirmed the *Roadway* principles in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), emphasizing the continuing need for

resort to the court's inherent power because it is "both broader and narrower than other means of imposing sanctions." 501 U.S. at 46. On the one hand, the inherent power "extends to a full range of litigation abuses." *Id.* On the other, the litigant must have "engaged in bad faith or willful disobedience of a court's order." *Id.* at 46-47. In *Chambers*, the Supreme Court left no question that a court may levy fee-based sanctions when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for an improper purpose. *Id.* at 45-46 & n.10.

***5** As is relevant here, "[b]efore awarding sanctions under its inherent powers ... the court must make an explicit finding that counsel's conduct constituted or was tantamount to bad faith." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) (internal quotations and citation omitted). The Ninth Circuit has extensively explained what constitutes bad faith in the context of "inherent powers" sanctioning authority:

> Under both *Roadway* and *Chambers*, ... the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct. For example, in *In re Itel Sec. Litig. v. Itel*, 791 F.2d 672 (9th Cir. 1986), counsel filed objections to exact fee concessions in an action pending before another court. The objections were not frivolous, nor were they submitted with any knowledge that they were meritless. But counsel's goal was to gain an advantage in the other case, which we concluded was "sufficient to support a finding of bad faith." *Id.* at 675. "For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith 'does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorney's fees.' " *Id.* (quoting *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980) (per curiam)).
>
> *Itel* teaches that sanctions are justified when a party acts for an improper purpose -- even if the act consists of making a truthful statement or a non-frivolous argument or objection. In *Itel*, the improper purpose was the attempt to gain tactical advantage in another case. 791 F.2d at 675 (discussing improper motivation). This approach is in harmony with *Roadway*, where the Supreme Court made clear that courts possess inherent power to impose sanctions for "willful abuse of judicial processes." 447 U.S. at 766.
>
> In reviewing sanctions under the court's inherent power, our cases have consistently focused on bad faith. For example, in *United States v. Stoneberger*, 805 F.2d 1391 (9th Cir. 1986), the district court imposed sanctions on a chronically late attorney. Reversing the imposition of sanctions, we held that mere tardiness does not demonstrate the improper purpose or intent required for inherent power sanctions. *Id.* at 1393. Rather, "[a] specific finding of bad faith ... must 'precede any sanction under the court's inherent powers.' " *Id.* (quoting *Roadway*, 447 U.S. at 767).
>
> We again reversed sanctions due to a lack of intent in *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989). In that case, the plaintiff's counsel negligently failed to comply with local court rules that required admission to the district court bar. We vacated the sanctions, holding that the district court may not sanction mere "inadvertent" conduct. *Id.* at 1485; *see also id.* at 1483 ("Nothing in the record indicates that their failure to request admission to the district bar was anything more than an oversight or ordinary negligence on their part."); *id.* at 1484 ("Willful or reckless disregard of court rules justifies punitive action."). Similarly, in *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993), we vacated the imposition of sanctions where there was no evidence that the attorney had "acted in bad faith or intended to mislead the court."

***6** *Fink v. Gomez*, 239 F.3d 989, 992-94 (9th Cir. 2001).

III. DISCUSSION

The Court first sets forth Chovanes's specific unprofessional, obstructive, harassing, frivolous, and willful conduct. The Court thereafter concludes Chovanes acted in bad faith and that sanctions are warranted based on the totality of her conduct.

A. Chovanes's Conduct

1. Instances of Chovanes Instructing Gardner to Not Answer Based on Impermissible Grounds

Under Rule 30, an attorney may instruct a client not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)" to terminate or limit the deposition on grounds of bad faith, oppression, and the like. Fed. R. Civ. P. 30(c)(2), (d)(3). If none of the enumerated objection grounds exists, the

objection may be noted on the record, "but the examination still proceeds; the testimony is taken subject to any objection." *Id.* at 30(c)(2).

1. As Plaintiff argues, on at least approximately 39 occasions, Chovanes did not adhere to Rule 30's limits on instructing a deponent to not answer or adhere to its procedures for addressing possible bad faith questioning. Instead, Chovanes cited impermissible grounds and did not allow Gardner to answer various basic questions despite preserving the objections on the record. The vast majority of these instances occurred before the parties' discovery conference with this Court and included instances where no reasonable attorney would object or instruct a witness to not answer a question. For example, Chovanes instructed Gardner to not answer the following benign foundational questions that any competent attorney would ask in the early stages of a deposition:

- Are you an officer of Avidas Pharmaceuticals? (Doc. No. 93-6 at 14:14-17.)
- Are you a member of Avidas Pharmaceuticals? (*Id.* at 14:19-22.)
- Are you a managing member of Avidas? (*Id.* at 15:7-8.)
- When was Avidas Pharmaceuticals formed? (*Id.* at 18:9-11.)
- Are there any current employees of Avidas Pharmaceuticals? (*Id.* at 29:2-5.)
- Where has Avidas been located since 2008? (*Id.* at 29:7-9.)
- Is Dan McCall a member of Avidas Pharmaceuticals, LLC? (*Id.* at 29:16-30:3.)
- Is Michael Warne ... a member of Avidas Pharmaceuticals, LLC? (*Id.* at 30:5-8.)

2. In addition to these simple background questions, Chovanes instructed Gardner to not answer several questions based on her erroneous assertion that they were beyond the scope of the Rule 30(b)(6) deposition notice and thus not subject to proper questioning. At the beginning of the deposition, Chovanes demanded that Ryan produce the deposition notice and proclaimed that deposition questioning would be limited to the topics in the notice. (Doc. No. 93-6 at 13:5-8 ("I would suggest ... you get the 30(b)(6) notice out, because you're not going to be able to go anywhere beyond that."); 14:2-4 ("But right now let's stick to the 30(b)(6) notice. Okay? Otherwise, you're not going to be getting answers.")) Chovanes even ludicrously contended Ryan could not ask basic foundational background questions because the deposition notice did not include such a category:

> ***7** What -- there's nothing on ... your 30(b)(6) notice, that says "foundational information."
>
> So you're beyond the scope of the 30(b)(6) notice too. So that makes no sense, foundational information. You're just making that up, sir.
>
> Let's proceed to what's on the 30(b)(6) notice, which is why we're here.

(*Id.* at 23:24-24:7.) The deposition transcript contains several other instances where Gardner was instructed to not answer based on "scope" objections, all of which were based on Chovanes's contention that any question not specifically tethered to one of the categories in the deposition notice was beyond the scope of the notice and thus beyond the scope of the deposition. (*See, e.g.*, *id.* at 28:5-10 (question about how to spell a product Gardner had mentioned in testimony); 31:3-8 (question about other products Defendant may have sold); 46:22-48:15 (Chovanes attempting to prevent questions related to inventory topic that *was* listed in the deposition notice); 51:14-22.)

Chovanes's objections here were baseless, of course, because Rule 30(b)(6) deposition notices *do not* limit the examiner to the topics listed in the notice. Although a party noticing a deposition pursuant to Rule 30(b)(6) "must describe with reasonable particularity the matters on which the examination is requested, ... the 'reasonable particularity' requirement of Rule 30(b)(6) *cannot be used to limit what is asked of the designated witness at a deposition.*" *ChriMar Systems Inc. v. Cisco Systems Inc.*, 312 F.R.D. 560, 563 (N.D. Cal. 2016) (emphasis added); *see also Moriarty v. Am. Gen. Life. Ins. Co.*, No. 17CV1709-BTM(WVG), 2019 US. Dist. LEXIS 62041, at *8 (S.D. Cal. Apr. 10, 2019) (Gallo, J.). "The 30(b)(6) notice *establishes the minimum* about which the witness must be prepared to testify, *not the maximum.*" *ChriMar Systems Inc.*, 312 F.R.D. at 563 (emphasis added); *see also see also Moriarty*, 2019 US. Dist. LEXIS 62041, at *8. Thus, deposition notice categories are simply the basic informational categories that a corporate representative should familiarize herself with to competently answer questions on behalf of the entity—they do not serve as handcuffs to limit the examiner from asking, for example,

basic foundational questions about the deponent or the entity itself.

Accordingly, Chovanes's unrelenting attempts to limit Ryan to the categories specified in the deposition notice were untethered to any legal authority or principle and were utterly baseless. Chovanes then compounded the error by instructing Gardner to not answer questions because, as explained below, "scope of deposition notice" is not a proper basis upon which a deponent can be instructed to not answer.

3. Chovanes also instructed Gardner to not answer various questions based on relevance grounds. (*See, e.g.*, Doc. No. 93-6 at 31:3-8; 45:10-20; 50:6-51:1; 53:13-22; 53:24-54:4; 60:4-61:8; 68:18-69:12; 73:8-12; 75:22-76:2; 78:11-15; 118:10-120:1.) A sub-set of Chovanes's relevance-based objections were based on Chovanes's incorrect assertion that this Court had limited the scope of *all* discovery to matters after May 2014. Chovanes's reference to the May 2014 "cutoff" was related to an Order this Court issued on February 8, 2019 following a discovery conference regarding disputed written discovery responses. (*See* Doc. No. 60.) Although the language of that Order seemed to limit all discovery to the time period after May 2014, the Court later issued a second written Order, clarifying that the first Order was limited to the written discovery at issue in that dispute—not discovery in general. (*See* Doc. No. 73.) At the deposition, Ryan was prepared, had a copy of the clarifying Order in hand, and he read the relevant portions to Chovanes. (Doc. No. 93-6 at 21:8-23.) Chovanes then shifted tactics, stating she recalled this Court orally limiting discovery to events after May 2014 during a telephonic discovery conference—but she could not identify when that occurred. (*Id.* at 21:25-22:11.)

***8** This Court has never limited the scope of all discovery as Chovanes asserted. However, this did not deter her from repeatedly instructing Gardner to not answer questions based on this erroneous reasoning—even after Ryan had read her the clarifying Order. (*See, e.g.*, *id.* at 45:16-20 ("Objection. Why is it relevant? This is dated '08 and we're talking about '14 and beyond. Objection. Don't answer that question. Move ahead."); 45:22-46:1 ("You can answer with regard to anything after May of 2014."); 46:15-18 ("You disagree with it, but she's not going to answer anything before May of 2014. [I]t's beyond the scope and it's not within the judge's order."); 52:13-17; 60:4-61:8 (Chovanes "foreclosing" questioning); 68:10-69:12 (question about other persons who may have maintained records related to the subject product); 70:15-18 ("I want to get to areas the Court said we should get to, not to areas that are irrelevant and before May of 2014.")).

Even if the above objections were factually accurate, Chovanes's instructions to not answer the questions based on relevance grounds nonetheless would have run afoul of basic principles of objecting during depositions. The plain and simple language of Rule 30 makes clear that

> [a]n objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, *but the examination still proceeds*; the testimony is taken subject to any objection.... *A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).*

Fed. R. Civ. P. 30(c)(2); *see also Brincko v. Rio Properties, Inc.*, 278 F.R.D. 576, 581 (D. Nev. 2011) ("The remedy for oppressive, annoying and improper deposition questioning is not simply to instruct a witness not to answer."); *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 262, 365 (N.D. Cal. 2000) ("As a rule, instructions not to answer questions at a deposition are improper."); Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 11(IV)-A § 11:1565 ("Rule 30(c)(2) renders 'relevancy' objections meaningless in most depositions. The deponent must even answer questions calling for blatantly irrelevant information 'subject to the objection.' "). Although Chovanes at times instructed Gardner to not answer based on privilege, the *vast* majority of Chovanes's instructions to Gardner did not fall within the Rule's enumerated bases and violated this exceedingly simple rule.

4. Although the above categories constituted the bulk of the inappropriate objections and instructions to not answer, there are other violative examples sprinkled in the transcript:

- MS. CHOVANES: Well, don't answer that question. "Required to follow" is not a legal question – I mean, it's

asking for your opinion, and that's not what we're here for. (Doc. No. 93-6 at 117:25-118:2.)

- Q. Can you generally describe what those agreements were.

  MS. CHOVANES: Objection. No don't answer that question. That's a ridiculous question. What do you mean by "generally describe." That's dangerous. I'm not going to let her answer that. Rephrase. There are titles right here so why don't you just ask her that. Why are you wasting our time? (*Id.* at 33:10-19.)

- Q. And generally speaking -- and I know you're not a lawyer. Generally speaking, what is your understanding as to what the know-how agreement provides?

  MS. CHOVANES: Objection. I'm not going to let you answer that question. If you want to point her to specific areas and ask her questions about facts, but that comes too close to opinion testimony so we're not going to answer. (*Id.* at 37:17-28:1.)

- Q. Exhibit 1 reflects a number of units of inventory of Vitaphenol products. Did Avidas confirm that it received each of those units of inventory that is stated on Exhibit 52 of Exhibit 1?

  ***9** MS. CHOVANES: Objection to the question. It's not understandable. It also misstates the document itself. So I'm not going to let you answer the question because it's not an accurate reflection of what's in the document. You can't make up stuff about the documents and ask the witness to testify. Go from the document itself. (*Id.* at 44:13-45:1.)

- Q. Where were those records located?

  A. In the Doylestown office.

  Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

  MS. CHOVANES: Objection; inference. I'm not going to let her answer that question because it's leading and it implies facts that aren't in evidence. (*Id.* at 79:4-12.)

- Q. Do you know whether all of the records that Avidas maintained relating to Vitaphenol products were retained?

  MS. CHOVANES: Objection. Don't answer that question.

  MR. RYAN: On what grounds?

  MS. CHOVANES: It makes no sense; and I'm not going to get into these areas without a specific question making sense. (*Id.* at 84:19-85:2.)

In addition to at times being nonsensical, none of these refusals to allow Gardner to answer complied with Rule 30(c)(2).

In sum, the transcript contains at least 39 instances where Chovanes violated Rule 30(c)(2) by instructing Gardner to not answer questions based on improper grounds.

2. Instances Where Chovanes Disruptively Instructed Ryan On How to Pose Questions to Gardner

In addition to the above, there can be no question that Chovanes deliberately frustrated, delayed, and impeded Gardner's deposition in other ways. Under Rule 30(c)(2), an objection "must be made concisely in a nonargumentative ... manner." However, Chovanes repeatedly violated this rule by making objections that were an attempt to instruct Ryan how to pose questions and disrupted the flow of the deposition. In many instances, Chovanes's objections were verbose, argumentative, accusatory, and anything but concise—all in violation of Rule 30(c)(2). Chovanes routinely engaged in speaking objections and then extensively argued with Ryan when he attempted to clarify or meet and confer about the objections. The following are representative examples from the 39 instances of this conduct identified by Plaintiff:

- Q. Are you an employee of Avidas Pharmaceuticals?

  A. I am the founder.

  MS. CHOVANES: Objection; irrelevant. Why don't you identify why the witness is here first. Okay? She's here pursuant to the 30(b)(6) notice that you issued. I think it's usually presentable to the witness at this point. Whether or not she's an employee or not is irrelevant; right? (Doc. No. 93-6 at 11:20-12:5.)

- Q. And you mentioned that Avidas Pharmaceuticals was -- began operations in around 2008. At the time that Avidas Pharmaceuticals began operations, was Vitaphenol the first product that it sold?

....

MS. CHOVANES: Objection. That question is in two parts, and I object to your saying that the witness mentioned anything. No need for a preamble. Let's just ask a nice clean question. Please restate the question. (*Id.* at 31:13-32:2.)

- Q. So Exhibit 51 is one of the agreements that Avidas Pharmaceuticals entered into with La Jolla Spa MD; is that correct?

  MS. CHOVANES: Objection. Don't ask questions so they lead, please. You may answer. (*Id.* at 37:7-12.)[6]

- Q. Did Avidas have Harmony manufacture new Vitaphenol anti-aging toner?

  A. Yes.

  ***10** MS. CHOVANES: You know what? While there's no question, I'm going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker?

  MR. RYAN: No.

  MS. CHOVANES: Why not, Counsel?

  MR. RYAN: But I think it's important that we go through each one.

  MS. CHOVANES: Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time. (*Id.* at 58:9-24.)

- Q. Where were those records located?

  A. In the Doylestown office.

  Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

  MS. CHOVANES: .... Just ask her simple questions. It's not that complicated.

  MR. RYAN: It's a simple question.

  MS. CHOVANES: No, it's not.[7] (*Id.* at 79:4-16.)

- Q. Do you believe that your file folder that contains emails relating to Vitaphenol contains all of the emails that were sent or received relating to Vitaphenol from 2008 to the present?

  MS. CHOVANES: Objection to the question; it's irrelevant, the use of the word "believe." Do you want to rephrase the question, please? I mean, you're obviously hunting to pin her down for destroying documents, and I think it's unfair. So ask a good question. (*Id.* at 88:24-89:9.)

- Q. In connection with this agreement, Avidas sold its inventory of Vitaphenol products to SciDerma; is that correct?

  MS. CHOVANES: .... Can you do that? Can you ask just open-ended questions -- was inventory transferred? -- and then maybe we can get into it that way.

  MR. RYAN: Well, I don't think I'm required to only ask open-ended questions.

  MS. CHOVANES: Well, I understand. You can ask them how you -- but my objection is with regard to the word "sold," which as you recall we already went through on an extensive go-around already with regard to paper discovery. I mean, I would just ask the witness -- you're pulling teeth. Why don't you just ask her what happened as a result of the agreement and see what happens. Maybe you'll get the statement you want. (*Id.* at 103:7-104:6)

- Q. Does SciDerma still owe Avidas some money in connection with the Harmony product inventory that was transferred to it?

  MS. CHOVANES: To the extent SciDerma is a company, that's an interesting question. I don't know if they're still in business. So why don't you ask within the scope of if the client knows they're -- if the witness even knows they're a company.

  MR. RYAN: Well, I just want to know whether Avidas believes that SciDerma still owes money in connection with the Harmony product.

  MS. CHOVANES: Avidas' belief is not relevant to this case, and she's not going to testify with regard to a legal matter. (*Id.* at 109:21-110:11.)

• Q. With respect to the inventory values that we see on Exhibit Roman numeral IV, do you know who came up with those values for the inventory?

MS. CHOVANES: Objection to the question. I don't know what "come up with" means," and I'd ask you to clarify and be precise with regard to your question. (*Id.* at 113:7-13.)

• Q. The packaging that we see on the left side of Exhibit 58 that's similar to the packaging we see in Exhibit 57. Do you see that?

MS. CHOVANES: Objection to your statement about similarity. Ask a question. Don't editorialize. (*Id.* at 160:3-9.)

***11** • Q. And that would be true for the entire period of time that SciDerma sold the Vitaphenol products: Information would come in various forms.

MS. CHOVANES: ..... Objection. Can you ask a question that makes sense, because that one doesn't. It's got too many parts. (*Id.* at 196:15-23.)

• Q. This report on Bates-stamped Page 1042 in the upper left-hand corner says "November and December sales." So is it your belief that these are November and December sales from the year 2010?

MS. CHOVANES: You're not entitled to her belief. Ask a question that seeks relevant information.

MR. RYAN: I disagree.

MS. CHOVANES: You're not entitled to her belief. That's an opinion. You're entitled to facts. Ask a simple question. I don't know why you mess them up by putting "belief" in. That calls for opinion testimony on its face.

MR. RYAN: I'm entitled to her opinion based on her foundation so far.

MS. CHOVANES: No, you're not entitled to her opinion. We'll go to the judge on that. You're not entitled to a person's opinion. They're a fact witness. So ask the question if you want. Again, I'll make the same objection. (*Id.* at 202:21-203:18.)[8]

• Q. On May 8th of 2014, you emailed Joe Kuchta, "Joe, this is the draft of the email I will send to Dianne York." Why did you send that email to Joe Kuchta?

MS. CHOVANES: Objection; there's been no foundation laid for the fact it's an email. Do you want to do that first?

BY MR. RYAN: Q. Did you send an email to Joe Kuchta on May 8th of 2014 a 7:35 a.m.?

A. Yes.

MS. CHOVANES: No, that's not the way to do it. Come on, Counsel. (*Id.* at 246:12-25.)

3. Instances of Chovanes Initiating or Attempting to Initiate Unnecessary Colloquy

Under Rule 30(d)(2), sanctions may be imposed for impeding, delaying or frustrating the fair examination of the deponent. Chovanes did all of these things by initiating or attempting to initiate unnecessary and frivolous colloquy and unnecessarily "noting" things during the deposition. Plaintiff identifies fifteen instances during which Chovanes initiated or attempted to initiate unnecessary colloquy. These unnecessary interruptions and discussions prolonged the deposition and served to continually harass Ryan. Some examples include:

• Q. Are you an employee of Avidas Pharmaceuticals?

MS. CHOVANES: Are you going to respond to what I said?[9]

MR. RYAN: No, you made your objection.

THE WITNESS: I'm the founder of the company.

MS. CHOVANES: Okay. I would like to know why we're here then, if you're not going to produce a 30(b)(6) notice. Are you going to acknowledge we're here pursuant to that?

MR. RYAN: We are here pursuant to a 30(b)(6) notice.

MS. CHOVANES: And what are the categories of that notice? Do you want to present them? Because as I pointed out to the Court, it's very difficult, given the history of this case and your repeated items -- your repeated arguments that you keep identifying, it's very difficult for us to have this deposition when you should have done this a long time ago.

You have been carefully proscribed by the Court to certain areas of relevance. I would suggest we start with

those and, therefore, you get that 30(b)(6) notice out, because you're not going to be able to go anywhere beyond that.

***12** Do you understand?

MR. RYAN: I've listened to your objection. I feel like I'm allowed to ask questions.

MS. CHOVANES: Okay. Well, you're not going to be. Anything beyond the scope of what the Court has ordered is the scope. And we reiterated at our last conference. We're not going to get into -- and don't interrupt me please. Let me finish.

Anything the Court specifically noted at the last conference that the Court's order was in place and the witness is not to answer anything beyond those orders. So we're going to have a continuing objection to anything beyond those and she's not going to answer.

You can either identify those categorically or waste everyone's time by going through those individually. But right now let's stick to the 30(b)(6) notice. Okay? Otherwise, you're not going to be getting answers.

MR. RYAN: Okay. Well, here's what I'm going to do. I'm going to ask questions, and you can make objections. And if you want to instruct the witness not to answer, you have that right.

MS. CHOVANES: Okay. Note that you've refused my offer to speed this up. Go ahead. (Doc. No. 93-6 at 12:7-14:12.)

- MR. RYAN: Well, I'm trying to develop foundational information, and this witness has already testified that she's the founder of the defendant in this case. So I'm trying to get some information – [10]

  MS. CHOVANES: What -- there's nothing on here, on your 30(b)(6) notice, that says "foundational information." [11]

  So you're beyond the scope of the 30(b)(6) notice too. [12] So that makes no sense, foundational information. You're just making that up, sir.

  Let's proceed to what's on the 30(b)(6) notice, which is why we're here. (*Id.* at 23:3-24:7.)

- Q. The information that's contained in Exhibit 61, the monthly reports, what's the source information for those reports?

  MS. CHOVANES: I'm going to object. That's an impossible question to answer, because this is a made-up document.

  Go through slowly and ask her the source of individual information to the extent she knows. But to say the source of all this information, if she can answer that summarily, go for it. But I think the question is confusing and unfair. (*Id.* at 192:23-193:9.)

- MR. RYAN: I'm not wasting your time.

  MS. CHOVANES: They're right in the 30(b)(6) notice. In fact, since there's no question outstanding -- is there? Or my objection to it, asking to rephrase. No, no question outstanding?

  I'm going to ask the witness to reread the 30(b)(6). And counsel do the courtesy of rereading the 30(b)(6) with the witness so as not to try to trick her.

  MR. RYAN: I don't need to read it. I wrote it.

  MS. CHOVANES: You need to read it, because you're trying to trick the witness, which I object to.

  So why don't you read it carefully and show her what agreements you're talking about.

  MR. RYAN: I'm not trying to trick the witness.

  MS. CHOVANES: Then why are you asking her questions without any foundation -- tenure to this 30(b)(6) notice? It just makes no sense.

  MR. RYAN: I'm sorry it doesn't make sense to you.

  MS. CHOVANES: Right --

  MR. RYAN: I'm allowed to ask questions.

  ***13** MS. CHOVANES: Right, you are, questions that make sense and are relevant and aren't wasting our time. And this is a garbage case, and we've known that since the beginning, and you're just wasting our time more.

  Now ask questions that she can answer with regard to the 30(b)(6). Whether or not she remembers the agreements

independently of a 30(b)(6) is meaningless and a waste of our time. (*Id.* at 33:20-35:7.)

- MR. RYAN: Well, it's not beyond the scope because the 30(b)(6) notice doesn't have any specific dates in it.

  MS. CHOVANES: Where does it have your statement about inventory?

  MR. RYAN: I'm asking questions about the sales and distribution agreement.

  MS. CHOVANES: Right. Where is -- no, you're asking about something that was received. That has nothing to do with this except it's listed in the agreement. You're not asking about the agreement, sir.

  MR. RYAN: I am. It's --

  MS. CHOVANES: No, you're asking about inventory, which is totally different and not on your list.

  MR. RYAN: It's No. 8 on my list.

  MS. CHOVANES: Inventory of products, not whether they were received from -- whatever. So your question, again, is not on this, according to your own example.

  MR. RYAN: Well, just so we're clear, a 30(b)(6) notice does not require me to list every question that I'm going to ask of a witness.

  Do you agree with that?

  MS. CHOVANES: I'm not going to talk about 30(b)(6) depositions generally. I'm talking about this one, and the scope is proscribed -- there's that word again -- by the 30(b)(6) as well the judge's order.[13] We've been going over this again and again. Please answer your questions – ask your questions within that scope. Why are you surprised? You keep re-attacking it. It's a statement, and we made it.

  MR. RYAN: Because you keep preventing me from asking questions.

  MS. CHOVANES: Right. That's exactly right. Yes, you're right.

  MR. RYAN: Right. So you're preventing me from asking questions about inventory at Avidas; is that true?

  MS. CHOVANES: Beyond the scope of the judge's order. Okay. Stop it. Go ask questions. We're not going to -- you've already wasted five minutes making meaningless arguments.

  Ask questions that are acceptable. Go. Otherwise, we're going to leave because you're wasting our time.

  MR. RYAN: I've already read you the judge's order clarifying his prior order. He said that his prior order is only limited to the interrogatories.

  Now, you had an opportunity to make a protective order motion, which you said you were going to do at one of the conferences, and you didn't do that. So if you had any objections to the scope of discovery, you could have raised them with the Court at the time, but you didn't.

  MS. CHOVANES: The Court -- that's because right after I said that, the Court said, Of course that's limited by our orders. That's what's in the transcript.

  I'm not going to argue anymore. Do you want to take her deposition with the allowable questions after 2014, which are, by the way, on your 30(b)(6). There are plenty of them. Go. (*Id.* at 46:19-49:11.)

- Q. I'm handing you a document that was previously marked as Exhibit 33 --

  MS. CHOVANES: Previously marked where?

  MR. RYAN: At a deposition of Topix?

  MS. CHOVANES: What deposition?

  MR. RYAN: Of Topix Pharmaceuticals.

  ***14** MS. CHOVANES: Where is the exhibit marker from Topix? Where is the original? Because otherwise, it's your reference, and I don't believe you.

  MR. RYAN: I'm representing that it was previously marked as Exhibit 33.

  MS. CHOVANES: Okay. We're subject to the objection that this is an unmarked exhibit, we're not going to -- we're going to take this whole area under advisement.

  What do you want to ask about this? Why don't you let me know that. And if you want to go off the record and

tell me why you want to ask about an unmarked exhibit that we've never seen before, that would be good.

MR. RYAN: I'm not sure why you can say you've never seen this before because this document was produced by Avidas and it's Bates number A_1138 --

MS. CHOVANES: There's no exhibit sticker on this, sir. There's no exhibit sticker. We've never seen this before, and you just represented it as an exhibit. You can't do that.

Where is the one with the exhibit sticker? Would you answer that?

MR. RYAN: Here's what I'll do. I'm going to mark this as Exhibit 54, as a new exhibit. (*Id.* at 61:10-62:18.)

- MS. CHOVANES: Well, what's the relevance of your question? Transaction happened in 2010. Give me an offer of proof and maybe we can forestall the Court.

  MR. RYAN: I'm not required to give you an offer.

  MS. CHOVANES: I know that, but maybe we can forestall the Court because you're asking about stuff that's in 2010 and makes no sense.

  I'm sure you have some elements in mind and you're just holding it back to extend this and torture me and the Court. So what's your -- what's your --

  MR. RYAN: If you've reviewed the third amended complaint –

  MS. CHOVANES: Okay. Well, tell me.

  MR. RYAN: If you've read the third amended complaint, you would know why this document was --

  MS. CHOVANES: Okay. Well, tell me. Don't hide it. Tell me.

  MR. RYAN: I don't need to educate you about the case.

  MS. CHOVANES: Oh, my goodness. Okay. Well, if you're not going to talk about why it's relevant and you're not going to explain what you have in mind -- (*Id.* at 118:24-120:1.)

- MR. RYAN: Next I want to mark as Exhibit 59 some images that were attached ... to a filing that Avidas made in this case.

  MS. CHOVANES: Specifically what filing?

  MR. RYAN: Docket 47-3.

  MS. CHOVANES: And what context? Again, I'm going to object to just producing documents out of context.

  MR. RYAN: Well, these are your filings so I'll leave it up to you.

  MS. CHOVANES: No, you have to give a context. We produced many files in this case, and if your answer is "that's your filing," it's simply unfair.

  MR. RYAN: The filing is Document 47-3 that was filed by Avidas in this lawsuit.

  MS. CHOVANES: Great. And what paper was it filed with? And what was the context? You can't ask the witness about something that's been filed with the particular context out of context. It's just unfair, Mr. Ryan. But you go ahead. (*Id.* at 162:22-163:20) [14]

- Q. I want to focus your attention on Exhibit 60. Please look at the first page of Exhibit 60, which is Bates number A-1044. What is this document that we see that's Bates-stamped 1044?

  MS. CHOVANES: Objection. What is this document? What does that mean? Do you want to ask her just what it is in -- with regard to her business?

  ***15** And, by the way, this probably also objected to under the protective order, so your client has to get off the phone.

  MR. RYAN: It's not subject to the protective order.

  MS. CHOVANES: It is, and I'm declaring it as such. It has to do with the company's business.

  If you're going to ignore the protective order, we're not going to have testimony on this basis, and the judge just said that. Okay?

  If you want to give me a proffer while your client gets off the phone and we go off the record, I'm willing to listen. But right now, since this is getting into their business, I have a real issue with you asking about it with her on the phone.

MR. RYAN: You didn't mark this document as confidential.

MS. CHOVANES: Great. And now you're asking about it.[15] (*Id.* at 175:4-176:6)

• Q. If you take a look at Exhibit 5, there's a series of emails. And the sequence of how the emails are set up is that the oldest email is on the top, and then the latest email in the chain is -- follows behind there.

MS. CHOVANES: Did you produce this in discovery?

MR. RYAN: Yes.

MS. CHOVANES: You produced this in discovery?

MR. RYAN: No, Mr. Kuchta did.

MS. CHOVANES: No, you produced it, your client.

MR. RYAN: No, no, no. Mr. Kuchta.

MS. CHOVANES: Yeah, why didn't your client produce this in discovery?

MR. RYAN: My client is not on the document. Why would my client have it?

MS. CHOVANES: I thought you just said it's a series of emails, and what's that? Her name right in the front here. Why didn't you produce this?

MR. RYAN: This is an embedded email. It's forwarded by Ms. Gardner to Mr. Kuchta?

MS. CHOVANES: Right. And why didn't you produced [sic] this email?

MR. RYAN: We'll deal with it at a different point in time.

MS. CHOVANES: No, no, no. It's unfair for you to be hiding documents and then all of a sudden produce them here.

MR. RYAN: I'm not hiding anything.

MS. CHOVANES: Are you saying you produced this? And if so, let me know exactly when.

MR. RYAN: I'm talking about Exhibit 5 as an entirety, this document was produced by Mr. Kuchta. Okay?

MS. CHOVANES: What document? There's no Bates numbers or anything on it. I just don't -- I'm -- all this is objection. We're going to go real slow, because I don't believe you, and your client should have produced this document. (*Id.* at 241:10-243:3)[16]

4. Instances of Chovanes Unnecessarily "Noting" For the Record

Plaintiff also identifies seventeen instances when Chovanes unnecessarily noted various things for the record. However, the Court isn't particularly concerned with many of these instances. Although many were gratuitous and certainly pointless, some happened when Ryan was calling his client or when the unnecessary "noting" did not disrupt the flow of the deposition. However, the following instances when Chovanes unnecessarily made objections or comments did disrupt and delay the deposition:

• [Discussing photographic exhibits attached to a motion Defendant had filed and Chovanes had submitted as part of a declaration.] MS. CHOVANES: What filing, sir?

MR. RYAN: Filing document 47-3.

MS. CHOVANES: And why was this -- do you have the rest of where this was? An appendix or something?

MR. RYAN: No.

***16** MS. CHOVANES: Note my -- excuse me. Let me object to this because we didn't produce anything like this, exclusive of other information, so I think it's unfair and out of context. Plus I'll note that there is no identification, there's no Bates number or anything on this, so I don't really accept counsel's representation.

With that said, you may answer if it's a relevant, nonprivileged question. (*Id.* at 157:1-15.)

• [Discussing the same photographic exhibits as above.] Do you believe that Exhibit 57 depicts the Vitaphenol packaging that was created by Harmony Labs?

A. I believe so but I'm not certain.

MS. CHOVANES: I'm sure something was said about this. Again, I'll note my continuing objection, as this was in a brief, and pulling it out of a context of a brief is unfair to the witness.

MR. RYAN: Do you agree that any statements made in the briefs filed by Avidas can be used as admissions against Avidas, Ms. Chovanes.

MS. CHOVANES: Don't answer that. That's a privileged question. Don't answer that.

MR. RYAN: I'm asking you, Ms. Chovanes.

MS. CHOVANES: I have no idea what you're talking about. We're here to ask the witness questions. Keep going. Note my objection. (*Id.* at 158:13-159:6.)

- Q. Next I'm handing you a document that's previously marked as Exhibit 24.

  MS. CHOVANES: By whom? By when?

  MR. RYAN: By me.

  MS. CHOVANES: When?

  MR. RYAN: At the deposition of Joe Kuchta.

  MS. CHOVANES: Again, the record will reflect there's no exhibit number, there's no Bates number, and I have a continuing objection to asking questions about this material.

  If counsel could show me in the transcript where this document has been marked, I would gladly withdraw my objection. (*Id.* at 251:8-21.)

None of the above colloquy served any reasonably practical purpose and served only to disrupt Ryan's questioning and delay the deposition further. Chovanes's petty quibbling about photographs that had been filed in this case by her own client were frivolous and served no useful purpose. Nor did her objections about Ryan's use of those photographs during the deposition based on them being used out of context simply because the photographs had originally been used as exhibits to one of Chovanes's client's court filings. What these continuous, unnecessary interruptions did do, however, was to systematically eat away at Ryan's allotted seven hours of deposition, disrupt Ryan's line of thinking and flow of questioning, and continue to obstruct the deposition.

5. Instances Where Chovanes Made Objections That Suggested To Gardner How She Should Answer the Question

Under Rule 30(c)(2), an objection "must be made concisely in a ... nonsuggestive manner." However, Chovanes repeatedly violated this rule by making suggestive objections that subtly coached Gardner how to answer Ryan's questions. The following are some representative examples.

- Q. What are the brand names of the products that Avidas has developed and produced since 2008?

  A. We have –

  MS. CHOVANES: To the best of your recollection.

  MR. RYAN: Ms. Chovanes, please don't provide speaking objections for the witness.

  MS. CHOVANES: That's an objection. I'm allowed to object. Are you objecting to the fact that I'm objecting?

  MR. RYAN: Yes, because --

  MS. CHOVANES: I'm allowed to object. It's not a speaking objection to say that your assumption may be incorrect.

  MR. RYAN: That wasn't what you said. You said to the witness --

  ***17** MS. CHOVANES: Your assumption – of course that's what I said. Your assumption was -- we're not going to read back. Just please go on.

  MR. RYAN: Please don't make speaking objections.

  MS. CHOVANES: Please ask questions that aren't objectionable; I won't be making speaking objections, which I'm not doing anyway. (Doc. No. 93-6 at 26:11-27:9.)

- Q. Has Avidas Pharmaceuticals ever had any involvement with a product called Vitaphenol?

  MS. CHOVANES: You can answer that.

  THE WITNESS: Yes.

  MS. CHOVANES: To the extent you understand what "involvement" means. (*Id.* at 30:10-15.)

- Q. Can you describe how the repackaged products that SciDerma created differed in look from the products that Avidas sold when it sold the Vitaphenol products?

MS. CHOVANES: That's a really long question. And what do you mean by "look" Because "look and feel" is actually a legal question, what's look and feel. So I -- excuse me, let me finish.

So I'm going to ask you to rephrase in light of the definition of "look" as possibly a legal definition. I mean, do you have one? Why is this relevant anyway? Having her factually describe stuff.

I mean, go ahead if you can answer it, but I would rather that you not use those legal terms, Mr. Ryan.

MR. RYAN: I'm not intending them in any legal sense.

MS. CHOVANES: Okay. Well, if you can answer, go ahead. (*Id.* at 151:6-152:1.)

- Q. Do you know who signed any of the checks that Avidas sent to La Jolla Spa at any point in time?

  MS. CHOVANES: Objection; irrelevant. It's your client. How should she know that?

  THE WITNESS: No, I do not. (*Id.* at 185:4-10.)

- Q. So if SciDerma made a mistake in the reports that it sent to Avidas, Avidas wouldn't know that there was a mistake; correct?

  MS. CHOVANES: Objection; asked and answered, plus it calls for speculation.

  You can answer if you are able.

  THE WITNESS: We didn't have any reason to mistrust the information --

  MS. CHOVANES: Just answer the question. (*Id.* at 209:12-21.)

Like Chovanes's other objections quoted throughout this Order, these objections lacked conciseness. While it appears Gardner at times did not heed Chovanes's comments, the objections nonetheless suggestively coached Gardner on how to answer Ryan's questions.

6. Instances of Chovanes's Discourteous or Aggressive Behavior Towards Ryan

Plaintiff also identifies two instances of Chovanes's discourteous behavior towards Ryan, one of which was an inexplicable outburst during which Chovanes stood and loomed over the examination table, aggressively accused Ryan of threatening Gardner, and then left the deposition room for a break. This bizarre incident occurred after Ryan declined Chovanes's request to take a break. Ryan instead stated he wished to proceed to finish the two-hour block of time since the Court had previously ordered the deposition proceed in two-hour increments with thirty-minute breaks. When Chovanes persisted, Ryan simply asked Gardner if she needed a break and likely would have taken a break had Gardner said she needed one. The bizarre outburst proceeded as follows:

MR. RYAN: We're not off the record.

MS. CHOVANES: Okay. Well, let's stay on. I want to talk about taking a break. It's 11:30, and the Court said they'll call in at 12:30 our time; right?

MR. RYAN: Yes.

***18** MS. CHOVANES: Okay. So what do you want to do about a break?

MR. RYAN: Well, I think we need to go for our allotted two hours, and then we'll take a break.

MS. CHOVANES: There's no allotted two hours. [17]

MR. RYAN: That's what the Court said, is we should take --

MS. CHOVANES: No, the Court didn't say anything about timing. [18] The witness – the witness is doing the best she can. And we moved this precisely for your convenience. Don't start doing that game. You've wasted plenty of time.

MR. RYAN: Do you need to take a break?

MS. CHOVANES: No, don't talk to my witness, ever. Don't you ever talk to my witness. Do you understand how threatening that is?

MR. RYAN: Why are you standing up? [19]

MS. CHOVANES: And how unprofessional that is?

MR. RYAN: Why are you standing up?

MS. CHOVANES: Because you're a male exercising male privilege and talking to my witness in a situation where she's already nervous. And you're talking to her directly?

That's, first of all, a violation of the ethical rules, as you know.

MR. RYAN: Why are you standing up?

MS. CHOVANES: We're going to take a break. Come on, Margie, let's take a break.

MR. RYAN: You're leaning over the table.

MS. CHOVANES: Yes, because of your threatening nature --

THE VIDEOGRAPHER: I'm sorry. You have the microphone on.

MS. CHOVANES: Because you threatened my witness just now. Don't you ever talk to her directly.

MR. RYAN: I did not threaten the witness.

MS. CHOVANES: Okay.

THE VIDEOGRAPHER: The [microphone] clip is still on it.

THE WITNESS: I'm sorry. I hope I didn't break it.

THE VIDEOGRAPHER: You can just leave it there. Off the video?

MR. RYAN: Not yet.

THE WITNESS: Excuse me.

(Whereupon, Ms. Chovanes and Ms. Gardner leave the deposition room.)

MR. RYAN: Now we're off the record.

THE VIDEOGRAPHER: Time is 11:37 a.m. We're going off the video record.

(Doc. No. 93-6 at 80:19-83:7.) This troubling tirade began with Ryan's seemingly benign question to Gardner, asking whether she needed to take a break. As with the rest of Chovanes's conduct during this deposition, the cold, typed words of the transcript truly do not do justice to the tone and tenor of Chovanes's sustained harassment of Ryan. This Court has reviewed the video clip of the above exchange. The video demonstrates that Ryan's voice was calm, relaxed, and non-threatening in any way. He also said nothing to Gardner that could remotely be considered threatening to trigger Chovanes's grossly disproportionate response.

What the Court can surmise from this interaction following Chovanes's rebuffed request to take a break is that it may have been fabricated in order to take the break. This appears to be the only reasonable explanation because nothing Ryan said could have warranted the inexplicably disproportionate response from Chovanes. However, once Chovanes reacted in this manner, she was able to leave the room and take the break she had requested under the guise of some feigned outrage in response to Ryan's completely benign and reasonable question to Gardner about her need for a break. Based on the transcript, this appears to be the only reasonable explanation for Chovanes's outburst. It certainly cannot be justified as a reasonable, rational response to anything Ryan said or did. In any event, such irrationally aggressive conduct toward opposing counsel is precisely the type of disturbing, unprofessional behavior that has no place in the legal profession. This conduct further served to disrupt the deposition and perpetuate the incredibly tense, rancorous atmosphere Chovanes had singlehandedly created from the opening minutes of the deposition.

7. Additional Examples of Chovanes's Harassing, Obstructive Behavior

***19** In addition to the above categories and examples Plaintiff cited, the Court's review of the full deposition transcript revealed many more instances of Chovanes's obstructive behavior.

1. For example, Chovanes constantly instructed Ryan to "hurry up," accused him of wasting her and Gardner's time, and generally attempted to rush Ryan's questioning. (*See, e.g.*, Doc. No. 93-6 at 14:24-15:1; 30:3; 33:18-19 ("Why are you wasting our time?"); 35:3; 48:16-18 ("Ask questions that are acceptable. Go. Otherwise, we're going to leave because you're wasting our time."); 50:16; 58:21-24 ("Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time."); 60:25; 74:18-20 ("You can answer, but that's the last question, because this is just wasting everyone's time."); 81:13; 85:25-86:1; 170:24; 214:8-9.) These comments by Chovanes are quite puzzling because Ryan was entitled to question Gardner for 7 hours regardless of how quickly or slowly he questioned her. Thus, these repeated comments by Chovanes served no other purpose than to harass and antagonize opposing counsel and to perpetuate the hostile atmosphere of the deposition.

2. Additionally, Chovanes made at least thirty "asked and answered" objections. (Doc. No. 93-6 at 70:4-6; 77:12-13; 77:19-20; 79:21-22; 85:23-24; 86:9-10; 87:13-14; 90:5-6; 92:13-14; 99:23-24; 105:5-6; 114:7-8; 132:22-23; 137:19-20; 138:1-2; 138:16-17; 161:13-14; 161:24-25; 162:7-8; 171:8-9; 173:11-12; 205:11-12; 210:3-4; 217:15-16; 225:20-21; 225:24-25; 228:12-19; 229:2-3; 237:9-10; 278:23-279:1.) In the context of a deposition, "asked and answered" objections are utterly pointless and serve no purpose.

3. Then there were eleven instances on which Chovanes simply objected by saying "objection" without specifying any basis for the objection. (Doc. No. 93-6 at 117:8; 191:20; 197:12; 197:17; 211:18; 236:19; 244:6; 261:13; 261:24; 262:4; 276:16.) Without a specific basis for an objection, "objection" alone is a pointless interjection and can serve no other purpose but to interrupt. These objections were consistent with Chovanes overall obstructive modus operandi in this deposition.

4. And then there were eighteen objections with a basis identified where the basis was nonsensical in the context of a deposition or intentionally obtuse about the meanings of words and could only be intended to obstruct and harass Ryan. Also included are argumentative "objections." These instances included:

- Q. How long has Avidas done that?

  MS. CHOVANES: Objection to the term "long." (Doc. No. 93-6 at 18:22-24.)

- Q. You signed as the president on behalf of Avidas Pharmaceuticals; is that correct?

  MS. CHOVANES: Objection; the document speaks for itself. (*Id.* at 39:6-9.)

- Q. Do you have any documents that reflect how much inventory Avidas received in 2008 from La Jolla Spa?

  MS. CHOVANES: Objection. Don't answer that question. You're getting into materials that even by your own admission are foreclosed.

  MR. RYAN: I didn't make any admissions. (*Id.* at 52:13-21.)

- MS. CHOVANES: Objection; mischaracterization of her -- now, don't start mischaracterizing her testimony just because you're upset. (*Id.* at 69:16-19.)

***20** • Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

  MS. CHOVANES: Objection; inference. I'm not going to let her answer that question because it's leading and it implies facts that aren't in evidence. (*Id.* at 79:6-12.)

- Q. Do you know whether all of the records that Avidas maintained relating to Vitaphenol products were retained?

  MS. CHOVANES: Objection. Don't answer that question.

  MR. RYAN: On what grounds?

  MS. CHOVANES: It makes no sense; and I'm not going to get into these areas without a specific question making sense. (*Id.* at 84:19-85:2.)

- Q. This document is also signed on behalf of SciDerma Medical by someone named Douglas S. Neal. Do you know who that is?

  MS. CHOVANES: Objection to the characterization. (*Id.* at 101:3-7.)

- Q. Has it done anything affirmatively to try to collect that money?

  MS. CHOVANES: Objection to the question. Don't answer. I don't like the prejudicial nature of the word "anything" and what was the other part -- anyway, rephrase the question, if you would. (*Id.* at 109:12-19.)

- Q. In the last column on Exhibit Roman numeral IV it lists inventory values for various products. Do you know who placed the value on those inventory items?

  MS. CHOVANES: Objection; assumes a fact not in evidence. (*Id.* at 112:23-113:4.)

- Q. So Mr. Henn was an outside consultant to Avidas; is that correct?

  MS. CHOVANES: Objection; asked and answered. Plus the vagueness of the term "outside consultant" is objectionable. (*Id.* at 134:6-10.)

- Q. Well, there's a difference between taking a bottle that's existing and pouring it into a new bottle, and taking

the existing bottle and then putting a new label on it. I'm trying to understand which of those two things, or something else, that SciDerma did. Do you have an understanding --

MS. CHOVANES: Objection. Can you ask a question that makes sense? That made no sense. I'm not going to let her answer it because it's inconsiderate of her to give her questions that make no sense. Come on. (*Id.* at 150:7-18.)

- Q. Can you describe how the repackaged products that SciDerma created differed in look from the products that Avidas sold when it sold the Vitaphenol products?

  MS. CHOVANES: That's a really long question. And what do you mean by "look"? Because "look and feel" is actually a legal question, what's look and feel. So I -- excuse me, let me finish.

  So I'm going to ask you to rephrase in light of the definition of "look" as possibly a legal definition. I mean, do you have one? Why is this relevant anyway? Having her factually describe stuff.

  I mean, go ahead if you can answer it, but I would rather that you not use those legal terms, Mr. Ryan.

  MR. RYAN: I'm not intending them in any legal sense. (*Id.* at 151:6-24.)

- [Chovanes objecting to a document that her client filed on the docket.] MS. CHOVANES: Note my -- excuse me. Let me object to this because we didn't produce anything like this, exclusive of other information, so I think it's unfair and out of context. Plus I'll note that there is no identification, there's no Bates number or anything on this, so I don't really accept counsel's representation. With that said, you may answer if it's a relevant, nonprivileged question. (*Id.* at 157:7-15.)

***21** • [Same as above.] MS. CHOVANES: No, you have to give a context. We produced many files in this case, and if your answer is "that's your filing," it's simply unfair.

  MR. RYAN: The filing is Document 47-3 that was filed by Avidas in this lawsuit.

  MS. CHOVANES: Great. And what paper was it filed with? And what was the context? You can't ask the witness about something that's been filed with the particular context out of context. It's just unfair, Mr. Ryan. But you go ahead. (*Id.* at 162:1-20.)

- Q. And that would be true for the entire period of time that SciDerma sold the Vitaphenol products: Information would come in various forms.

  MS. CHOVANES: Objection.

  MR. RYAN: -- related to sales?

  MS. CHOVANES: Sorry. Objection. Can you ask a question that makes sense, because that one doesn't. It's got too many parts.

- Q. So this is the monthly report for November 30th of 2011; is that true?

  MS. CHOVANES: Objection; document speaks for itself.

- Q. Who did you have discussions with at SciDerma about terminating the agreement between Avidas and SciDerma?

  MS. CHOVANES: Assumes a fact not evidence. Objection. (*Id.* at 215:12-16.)

- Q. How was -- how were the Vitaphenol products being sold in early 2014, before May of 2014?

  MS. CHOVANES: Objection. Please clarify the question. "How" means so many things I'm not going to let her answer it because it's too ambiguous. (*Id.* at 220:24-221:5.)

The deposition transcript contains additional examples, and the Court could go on. Suffice it to say that all of the above representative examples of various pointless or nonsensical objections highlight Chovanes's unrelenting interruptions of Ryan's questioning, interposing objections that either made no sense or served no practical purpose in the context of a deposition (as opposed to a trial). For example, there is no planet in any solar system on which the word "how" is ambiguous in the context of Ryan's final question above. The same is true for the word "long" in the first example cited above.

5. Finally, the transcript contains examples of discourteous conduct towards Ryan that interrupted and delayed the completion of the deposition. Chovanes disparaged Ryan and his case throughout the deposition, calling the case

"garbage" (Doc. No. 93-6 at 35:1-2, 68:24) or maligning him personally and the nature of his questioning (*see, e.g.*, *id.* at 118:3-4 ("Again, you're belaboring the witness, you have so many 'belief' questions."); 228:10-13 ("If you keep asking questions that are objectionable, we're really not getting anywhere. So let's go, come on Counsel. Ask questions that are good ones."); 267:16-17 ("Ask a real question with a noun, a topic and date.")).

B. Chovanes's Conduct Multiplied Proceedings Under Rule 30(d)(2)

The Court has painstakingly enumerated numerous examples that collectively demonstrate Chovanes systematic impeding, delaying, and frustrating the fair examination of Gardner. From the opening moments of the deposition, Chovanes adopted a hostile tone and posture against Ryan and then unrelentingly proceeded to make Ryan's examination as difficult as possible. Chovanes employed all of the categories of tactics identified above to continuously interrupt the deposition and mercilessly harass Ryan. Every baseless objection, diatribe, argumentative comment, and petty argument cumulatively compounded to greatly extend the time spent in deposition. And every baseless interruption identified above served to harass Ryan, shift his focus away from the purpose of the deposition and towards battling Chovanes, and greatly frustrated the fair examination of Gardner. Rather than being able to focus on Gardner and this case, Ryan was continuously drawn into squabbles with Chovanes as the seven hours allotted for the deposition quickly burned away. Accordingly, this Court easily finds sanctions upon Chovanes are appropriate under Federal Rule of Civil Procedure 30(d)(2). [20]

C. Chovanes Unreasonably and Vexatiously Multiplied Proceedings Under 28 U.S.C. § 1927

***22** Under 28 U.S.C. § 1927, any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 thus provides the Court the authority "to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings." *Gadda v. Ashcroft*, 377 F.3d 934, 943 n.4 (9th Cir. 2004). Here, the Court finds Chovanes unreasonably and vexatiously prolonged Garner's deposition *far* longer than necessary and *far* longer than it would have taken without Chovanes's incessant, baseless, petty interruptions and drawing Ryan into unnecessary, frivolous disputes and discussions. Indeed, the transcript is replete with Chovanes's misconduct, and it appears Chovanes spoke more at the deposition than Garner spoke. Without Chovanes's conduct, the deposition would have concluded far sooner and would have been a far more productive and pleasant experience for everyone involved, including Garner. Interruptions and objections could be justified if they could reasonably add value to representing a client in a deposition. However, Chovanes's frivolous conduct added no such value and instead created a highly corrosive atmosphere that never should have been created. Because Chovanes's conduct was often baseless, it was unreasonable and vexatious. [21] Accordingly, this Court finds ample basis to impose section 1927 sanctions upon Chovanes. [22]

D. Sanctions Are Also Appropriate Under the Court's Inherent Power

Finally, sanctions are appropriate under the Court's inherent power because Chovanes's conduct went far beyond the multiplication of proceedings that Rule 30(d)(2) and section 1927 address. The Court's inherent power "extends to a full range of litigation abuses." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *see also Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001) ("Under both *Roadway* and *Chambers*, ... the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct.") In addition to wastefully prolonging and multiplying proceedings at the Gardner deposition, Chovanes engaged in a wide range of harassing and abusive behavior that this Court finds intolerable. As explained immediately below, this behavior was carried out in bad faith and with the intent to obstruct the fair examination of Gardner.

E. Chovanes Acted In Bad Faith

For the purposes of both section 1927 and inherent power sanctions, this Court finds Chovanes acted in bad faith. Because this Court has had extensive experience with Chovanes and Ryan over the past seven months over many hours of hearing arguments and a Mandatory Settlement Conference, this Court has become very familiar with both attorneys. *See generally Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) ("Deference to the determination of courts on the front lines of litigation [that sanctions are warranted] will enhance these courts' ability to control the litigants before them."); *see also Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 965, 966 (9th Cir. 2004). Based on this Court's extensive experience with Chovanes, her

conduct at the deposition was hardly surprising. It was simply a *drastically* amplified version of the conduct that the Court had witnessed first-hand in the past. Given the totality of the deposition transcript, this Court finds that Chovanes acted with knowledge, with the intent to harass Ryan, and to delay and obstruct the questioning of Gardner as much as possible. The Court further finds that her conduct was frivolous and that she acted with subjective bad faith.

***23** Chovanes demonstrated a knowing intent to harass Ryan based on the long-held belief that this case is "garbage"—a belief that Chovanes has repeated multiple times during on-the-record discovery conferences before this Court prior to the deposition and even during the very hearing the Court held on this sanctions motion. Based on that long-standing belief, Chovanes unleashed her harassing, obstructive behavior full force against Ryan during a critical moment in Plaintiff's case—the deposition of the founder of Defendant that could potentially yield valuable information for Plaintiff's case. The transcript amply demonstrates that Chovanes's conduct was not inadvertent, accidental, or negligent—it was knowing, intentional, and willful. And the transcript is littered with example after example of frivolous objections, comments, arguments, and attacks—many so ludicrous that any competent attorney would refrain from employing. In addition to the frivolity of the objections, comments, and interruptions, Chovanes's improper purpose is plainly evident in the transcript. She intended to harass and obstruct Ryan's questioning as much as possible based on the staunch belief that this is a "garbage" case brought to harass Defendant. Obviously, the more frequently Chovanes interrupted Ryan and engaged him in distractions and argument for extended periods, the more of the seven hours allotted for Gardner's deposition would be consumed by Chovanes speaking rather than Gardner answering questions that could harm Defendant's case. And that is precisely what happened here, as the transcript is littered throughout with Chovanes's wasteful, frivolous interruptions.

In her defense, all Chovanes can muster is that Plaintiff suffered no prejudice despite her conduct because Ryan was ultimately able to ask his questions and stated at the end of the deposition that he had no further questions. Chovanes has never acknowledged that her conduct was in any way improper. Unfortunately, Chovanes's weak defense falls flat because sanctions under the Court's inherent powers are available *even if* an attorney's conduct was not frivolous if that conduct was for an improper purpose. *Fink v. Gomez*, 239 F.3d 989, 992-94 (9th Cir. 2001). And for purposes of section 1927, the relevant inquiry is not whether the victim suffered prejudice, but whether the improper tactics were intended to increase expenses or delay proceedings. *See New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989) ("Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith.").

Here, of course, Chovanes's conduct *was* frivolous and, as the Court concludes above, her conduct was undertaken for an improper purpose to harass, obstruct, and delay the orderly questioning of Gardner to which Ryan was entitled. Chovanes's repeated and unyielding interference with Ryan's efforts to conduct a professional, orderly deposition revealed her true motive—to improperly frustrate Gardner's deposition. This obstructive tactic, which has no place in the legal process, was conceived and executed in bad faith.

Chovanes accordingly violated the basic standards of professionalism expected of all attorneys appearing before this Court. *See* S.D. Cal. Civ. L.R. 83.4 Chovanes was not courteous or civil; acted in a manner detrimental to the proper functioning of the judicial system; disparaged opposing counsel; and engaged in excessive argument, abusive comments, and delay tactics at Gardner's deposition. The sheer volume of Chovanes's antics belie any notion of mistake or negligent conduct on her part but rather disturbingly reveal a systematic effort to obstruct Ryan for no good or justifiable reason or purpose. Chovanes undeniably acted in bad faith.

F. Amount of Sanctions

Plaintiff seeks a two-fold sanctions award of $7,242.03 in costs incurred by Dianne York, the President of Plaintiff La Jolla Spa MD, Inc., and $21,360 in its attorney's fees incurred for the Gardner deposition and these sanctions proceedings. Although Defendant has now had two opportunities to challenge the propriety or amount of costs and fees, Defendant failed to argue these amounts were either improper or excessive. Defendant's opposition made no such attempt, and Chovanes also made no such attempt at the sanctions hearing. The only objection to these amounts is as follows: "The sworn statements seeking the thousands of dollars lack any back up documents and counsel and his client tell different stories about what happened and their supposed expenses." (Doc. No. 94 at 5.) First, with respect to the "back up documents," the Court finds York and Ryan's sworn declarations sufficient and reliable evidence of their fees and costs. Ryan's declaration sets forth his hourly rate, the

time spent on each billing entry, and describes each entry with reasonable particularity to allow the Court to review its propriety. This is common practice for plaintiffs' attorneys who seek fees or sanctions. And York's declaration sets forth sufficient details and supporting documentation to justify the costs incurred. This Court has no reason to doubt the accuracy or veracity of the declarations or the amounts set forth therein.

***24** Second, it is of no moment that the two declarations differ as to the date on which Ryan travelled for the Gardner deposition. Whether he travelled on May 1 or May 2, there is no dispute that he actually travelled to Philadelphia for the deposition. He was there, and he incurred costs and fees to get there. The trivial discrepancy between the declarations does nothing in this Court's mind to discredit the declarations *in toto*.

Other than the objection discussed above, Chovanes has not provided any other specific basis or challenge to the amount Plaintiff requests in sanctions. Nor has she even argued that sanctions amount is generally excessive. At the sanctions hearing, although the Court specifically addressed Chovanes's failure to do so, she again failed to raise any challenge to the amount or portions thereof. As a result, no reduction is appropriate. *See Bylin Heating Sys. v. Thermal Techs., Inc.*, No. 11CV1402-KJM-KJN, 2014 U.S. Dist. LEXIS 30809, at *13-14 (E.D. Cal. Mar. 10, 2014) (imposing $32,851.29 in sanctions and finding: "In any event, by twice failing to oppose plaintiffs' motion for attorneys' fees and costs after appropriate notice, defendant has waived any argument that the time spent on any particular task, and/or the total number of hours spent on this case, are unreasonable."); *see generally Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) (fee opponents failed to meet burden of rebuttal, because opponents failed to point out with specificity any charges that were excessive or duplicative); *Columbia Pictures Tel. v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 296 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 340 (1998) (rejecting argument that certain hours should have been excluded, because no specific objection was raised in district court); *see also Smith v. Rogers Galvanizing*, 148 F.3d 1196, 1199 (10th Cir. 1998) (district court did not abuse discretion in refusing to reduce hours as to which fee opponent made no specific objection); *Sheets v. Salt Lake City*, 45 F.3d 1383, 1391 (10th Cir. 1995) (fee opponent who argued merely that fee request was exorbitant and duplicative failed to carry burden of opposing fee, and waived issue for purposes of appeal). In any event, the Court has independently reviewed both declarations and requests for sanctions and finds the hourly rate, total amounts, and bases for sanctions reasonable and proper. *See Gates v. Deukmejian*, 987 F.2d 1392, 1401 (9th Cir. 1992) (court has duty "to independently review plaintiffs' fee request even absent defense objections").

IV. CONCLUSION

***25** Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. Chovanes's atrocious conduct at the Gardner deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but Chovanes trampled that line long before barreling past it. Chovanes's frivolous, willful, vexatious conduct greatly expanded the Gardner deposition far beyond what the proceedings would have lasted without her unending unjustified interruptions and harassment of Ryan. Plaintiff's motion for sanctions is GRANTED, and Chovanes is sanctioned for the conduct, reasons, and under the authority set forth above. Accordingly:

1. Without reimbursement from Defendant, Chovanes is sanctioned in the amount of $28,502.03 payable to Ryan's trust account **on or before September 17, 2019**.

2. Chovanes shall self-report to the State Bar of Pennsylvania **on or before September 24, 2019**. The reporting shall consist of a copy of this Order, the full transcript of the Gardner deposition, the full transcript of the August 16, 2019 sanctions hearing, and the 128 video clips submitted as part of Plaintiff's sanctions motion. **On or before October 1, 2019,** Chovanes shall file a declaration under oath that confirms compliance with this Order and that all documents and video clips were submitted to the State Bar of Pennsylvania.

3. Chovanes shall henceforth attach a copy of this Order as an exhibit to any pro hac vice application for admission to practice before the United States District Court for the Southern District of California. This requirement shall have no expiration date and shall remain in effect *in perpetuity.*

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 4141237

Footnotes

1 This discovery conference resulted in extension of the fact and expert discovery deadlines to April 23, 2019 and June 17, 2019, respectively. (Doc. No. 76 ¶ 7.)

2 The only restrictions the Court had placed on the deposition was that it be taken over the course of one day, in two-hour blocks, with 30-minute breaks, and for seven hours, exclusive of breaks. Because Defendant did not seek a protective order despite the opportunity the Court had provided, there were no substantive restrictions on the deposition aside from the standard restrictions applicable to all depositions.

3 Unless otherwise noted, all citations to documents filed on the CM/ECF docket refer to the electronic page numbers generated by the CM/ECF system, not to the document's original pagination. However, citations to the Gardner deposition transcript refer to the transcript's original page numbers.

4 The cold typewritten words of the deposition transcript fail to do justice to the truly hostile environment Chovanes created at the deposition. To be sure, the transcript conveys great tension and hostility, but the video shows the true story. The Court has reviewed each of the 128 video clips Plaintiff submitted in support of its sanctions motion. Chovanes's aggressive, argumentative, accusatory, and hostile tone of voice greatly amplified the thick tension and hostile atmosphere of the room even beyond what the transcript conveys.

5 Because the Court's imposition of sanctions will necessarily require discussion of the specific conduct and findings thereon, the specifics of these 133 examples—and other examples the Court found in the transcript—will be set forth in greater detail in Part III below. In addition to these 128 clips, the full deposition transcript evidences other instances of Chovanes's unjustified obstructive, cantankerous behavior.

6 As an initial matter, this was not a leading question. The question sought confirmation or denial of the nature of the document Ryan referenced. But in any event, of course Ryan was allowed to ask leading question of Gardner, who was a witness identified with an adverse party. Fed. R. Evid. 611(c)(2). This objection and admonition was frivolous, unnecessary, and another example of the frivolous and incessant haranguing Ryan endured throughout the deposition. (*See also* Doc. No. 93-6 at 79:11-12; 103:12-13.)

7 In fact, Ryan's question *was* exceeding simple.

8 Of Course, lay witnesses—like Gardner was—may provide opinion testimony if the opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. In any event, even if Gardner's testimony eventually would not be admissible at trial, Rule 30(c)(2) nonetheless did not allow Chovanes to instruct Gardner to not answer or to completely preclude questions that called for opinion testimony. The testimony should have proceeded subject to the objection. These are basic principles that are not confusing, ambiguous, or subject to differing interpretations.

9 Chovanes began the deposition by insisting that Ryan produce the Rule 30(b)(6) deposition notice and enter it into the deposition record. This Court is not aware of any requirement for such a procedure. Nonetheless, Chovanes refused to allow Gardner to answer questions until Ryan produced the notice (Doc. No. 93-6 at 14:16-17; 14:21-22; 15:7-10; 16:8-16) and threatened to terminate the deposition if he did not do so (*id.* at 14:32-15:4). Apparently seeing that he would get nowhere without capitulating to Chovanes's demand, Ryan finally yielded and marked the notice as an exhibit. (*Id.* at 17:7-13.)

10 While she herself demanded she not be interrupted and be allowed to finish statements (*see, e.g.*, Doc. No. 93-6 at 10:5-6; 13:16-18; 151:13-14, 174:16-20), Chovanes repeatedly interrupted Ryan and did not allow him the same courtesy (*see, e.g.*, *id.* at 26:21-22; 27:1-2; 62:9-11; 160:11-14).

11 Of course basic foundational or background information is plainly a proper area to question a witness.

12 Chovanes repeatedly pushed this Rule 30(b)(6) deposition notice scope issue, which was neither a valid basis for objecting nor instructing Gardner to not answer questions. The Court addresses this issue of Chovanes's dubious instructions elsewhere in this Order.

13 This Court issued no orders limiting the substantive scope of the deposition. Although this Court provided Defendant the opportunity to file a motion for a protective order for this very deposition (*see* Doc. No. 82 ¶ 2), Defendant failed to eve file any such motion.

14 Docket Entry 47 was Defendant's opposition to Plaintiff's motion for leave to file a third amended complaint. Docket Entry 47-3 contained ten color photographs attached as exhibits to the opposition. The opposition included a declaration signed by Chovanes, stating that these specific exhibits were "true and correct copies of images of products and invoices that LaJolla [sic] provided Avidas in discovery." (Doc. No. 47-1 ¶ 27.) Here, Chovanes challenges the very exhibits her own client filed on the case docket.

15 Of course Ryan had no reason not to ask about the document since Chovanes had admittedly not marked it as covered by the general Protective Order that covered the confidentiality of documents and information in this litigation. (*See* Doc. No. 63.) Regardless, to appease Chovanes, Ryan hung up the telephone call with his client. (*Id.* at 176:7-8.) But after briefly discussing the document, Chovanes conceded it was not covered by the Protective Order after all. (*Id.* at 177:3-7.)

16 This is yet another example of an unnecessary diatribe that wastefully consumed Ryan's available deposition time. The email communication in question was a forwarded message from Kuchta (Defendant's buyer) to Gardner (Defendant's founder).

17 (*But see* Doc. No. 82 ¶ 1.)

18 (*But see id.*)

19 The video clip shows Chovanes standing and leaning across the examination table with her arm half extended across the table. At the sanctions hearing, Chovanes briefly mentioned displeasure with the videographer's choice of camera angles. However, the camera was placed directly in front of Gardner and did not show either of the attorneys until Chovanes stood up and leaned across the table and into the video frame. The video angle is standard, and the Court finds nothing questionable about the videographer's positioning of the camera.

20 Although a finding of bad faith is not required for Rule 30(d)(2) sanctions, this Court expressly finds Chovanes's impeding, delaying, and frustrating Gardner's fair examination was in bad faith. (*See*, *infra*, Part III(E).)

21 However, this conclusion does not end the section 1927 analysis. Because subjective bad faith is relevant to both section 1927 sanction and "inherent powers" sanctions, the Court will discuss Chovanes's subjective bad faith below.

22 *Accord Grochocinski v. Mayer Brown Rowe & Maw LLP*, 452 B.R. 676, 686 (N.D. Ill. 2011) (exercising discretion to impose section 1927 sanctions for counsel's unprofessional and childish behavior because plaintiff's counsel, during plaintiff's deposition, repeatedly obstructed questioning with improper interruptions, objections, insults, and accusations that defendants' motions were fraud.); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292 (S.D.N.Y. 1987) (finding attorney was personally liable, without reimbursement from client, for costs of deposition of plaintiff where counsel's "contentious, abusive, obstructive, scurrilous, and insulting conduct" resulting in comments and statements other than objections to form of question apparent on 132 out of 147 pages of deposition transcript, constituted bad faith, intended to harass and delay and reflected willful disregard for orderly process of justice.); *Brignoli v. Balch, Hardy & Scheinman, Inc.*, 126 F.R.D. 462, 466-67 (S.D.N.Y. 1989), modified, 1989 U.S. Dist. LEXIS 14190 (S.D.N.Y. Nov. 30, 1989) (finding attorney was subject to sanctions for discovery behavior in asking repetitive questions, making improper objections and directing clients not to answer proper questions, and made speaking objections even after court expressly prohibited them, resulting in deposition proceeding lasting hours longer than necessary.)

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